patentee was the first to combine them for a particular purpose he is entitled to be protected in that improvement.

Stillwell & Bierce vs. Cin. Gas Co., 1 B. and A. 610.

Stimson vs. Woodman, 10 Wal. 117.

Loom Co. vs. Higgins, 103 U. S. 580.

Valve Co. vs. Crosbie, 113 U. S. 157.

Butler vs. Bainbridge 29 Fed. Rep. 142.

Osborn vs. Glazier et al. 40 O. G. 1137

Hicks vs Otto, 18 Fed. Rep. 749.

Pearl vs. Ocean Mills, 11 O. G. 2.

Morley Sewing Machine Co. vs. Lancaster, 129 U. S., 263.

Hartlan vs. Schillinger, 130 U. S. 456.

GEO. J. MURRAY.

Counsel for Appellants.

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1890.

No. 225.

CHARLES HOFF and PETER RENNER

vs.

IRON CLAD MANUFACTURING CO.

BRIEF FOR APPELLEE ON APPEAL.

FREDERIC H. BETTS,
ERNEST C. WEBB,
Of Counsel for Appellee.

C. G. Burgoyne, 146-150 Centre Street, New York.

Supreme Court of the United States,

OCTOBER TERM, 1890.

CHARLES HOFF and PETER RENNER, Appellants, AGAINST THE IRONCLAD MANUFACTURING COMPANY.	No. 225.

BRIEF FOR APPELLEE ON ABOVE APPEAL.

Statement.

The bill in this case was filed to restrain the infringement of letters patent, granted to Charles Hoff and Peter Renner on the 19th day of June, 1883, No. 279,871, for an alleged improvement in coal hods. The bill was filed August 11, 1884, and is in the usual form, alleging the grant of the patent and charging infringement (Rec., pp. 1, 2, 3).

The answer was filed October 6, 1884, and presents the following defenses :

1. That the complainant Charles Hoff was not the original or first inventor of the said alleged improvement.

2. That said letters patent are null and void for want of utility and for want of invention.

3. That said letters patent are null and void for want of sufficient description and specification.

4. A denial that defendant has infringed.

5. That said alleged improvement had been patented and described in printed publications prior to said Hoff's supposed invention thereof.

6. That said alleged improvement had been abandoned to the public.

7. A denial that said letters patent are or were granted for any patentable subject matter within the Patent Acts of the United States (Rec., pp. 5, 6, 7, 8, 9). Replication was filed and proofs taken.

The cause came on to be heard before his Honor Judge WALLACE, who rendered an opinion, in which he held that defendant infringed the first claim only of said letters patent (Rec., pp. 64-65). On pettition, the cause was reopened for further proofs and the cause ordered to be reheard (Rec., p. 70). Further proofs were taken and the cause came on for rehearing before Judge WALLACE, who rendered a second opinion, in which he held that defendant did not infringe *any* claims of said letters patent (Rec., p. 101).

Final decree was entered May 5, 1887, dismissing the bill with costs (Rec., p. 102).

Complainant's appeal from said decree was allowed by his Honor Judge WHEELER June 15, 1887, (Rec., p. 103).

FIRST POINT.

History of Facts.

1873. As early as 1873 the defendants knew of the construction of iron cylinders for holding metal plates of the form shown in "Defendant's Exhibit Zinc Cylinder."

Young's evidence (Rec., p. 38, Qs. 26-29).
Reynold's evidence (Rec., p. 27, Qs. 10-13).
Wells' evidence (Rec., p. 45, Qs. 5-9).

These zinc cylinders are obviously metal cases or bodies in which the ends or bottoms are formed in part of the same piece of metal which forms the sides; such metal of the sides being folded inwards into crimps and the crimps flattened down. A central circular piece of wood was used to complete the ends or bottoms.

1879. In December, 1879, Reynolds, an employee of the defendants, knowing of the zinc cylinders in question (Rec., p. 26, Q. 4) conceived the idea of constructing a coal hod upon the principle. At that time he formed models of such coal hods, using the principle of construction of the zinc cylinders.

These models of 1879 clearly show that Reynolds, at that time, had conceived the idea of making a coal hod in which the sides and bottom should be formed out of one piece of metal, and that the bottom, while being integral with the sides, should at the same time be thicker and stronger in order to sustain the extra wear to which it is subjected in use.

He says himself that his idea was at that time (Rec., p. 26, Q. 8), viz.:

"A coal hod in one or two pieces; that is, to form "the body and the bottom by throwing in the lower "edge of a hod, by crimping or folding the surplus "stock to form the bottom."

Circumstances diverted his attention from this subject from the early part of 1880 to the latter part of 1883 (Rec., p. 26, Q. 4; Rec., p. 27, Q. 15), but the models were carefully preserved and the originals are now presented to the Court (Rec., p. 26, Qs. 5-7), and the construction of them was explained prior to 1882 to several parties, viz.: Mr. Peacock, Mr. McKenzie, Mr. Young and Mr. Shepard, Rec., p. 27, Q. 14).

Mr Young says that he saw these models in January, 1880 (Rec., p. 37, Qs. 5–6).

What he understood from them was (Rec., p. 37, Q. 7):

" That a coal hod could be made in one piece by " turning the lower edge in, by lapping or crimping to " form the bottom."

Mr. Peacock had charge of these models and preserved them from January 1st, 1881, until (as it seems) they were presented in this case (Rec., p. 40, Qs. 8–10).

Mr. Peacock understood the invention to consist in " folding or turning in a portion of the body by lapping " or crimping to form folds by which to take up surplus stock, thereby forming the bottom " (Rec., pp. " 40, 41, Qs. 13–14).

Mr. McKenzie saw the same models in the latter part of 1879, or January, 1880 (Rec., p. 45, Qs. 9–11):

He understood the Reynolds invention to be at that time, " the body and bottom in one piece, the body " folded to make the bottom " (Rec., p. 45, Q. 14).

There is no contradiction of any of this evidence.

It is quite likely that Reynolds and the other workmen of the defendant did not at the time fully appreciate what, if any, economy there would be in the manufacture of coal hods according to the plan that Reynolds had invented, but that the conception was clear in their minds, and that the invention was so far embodied in a practical form that any workman could have made hods of suitable size and from suitable material there can be no doubt.

If inwardly sloping sides are an essential characteristic of coal hods, then these witnesses understood in 1879 that the folding in to form the bottom was to be practiced on bodies of that form.

The fact that these models were carefully preserved during the intervening year shows that the device was considered of some value, and that it was expected to be taken up and manufactured at a subsequent time.

1882–1883. About this time Charles Hoff, the complainant (four years subsequent to Reynolds), seems to have thought of the same contrivance.

Dieckmann, his friend and expert, says that about two years and a half before his testimony was given *i. e.*, about July, 1882) he saw Hoff make some experiments with coal hods (Rec., p. 16, Q. 10).

What he saw was this (Rec., p. 16, Qs. 11–15):

" Q. 11. Please describe the experiments you are " familiar with, and which you say were made in " your shop ?

" A. I saw him crimp in a coal hod then similar to " this Iron-clad hod here, but the patch was larger in " the centre. The patch in the centre was about four " or five inches. Then he had another one with a large " rivet in it; it was botched up because made by hand " and without tools. Then the last experiment was the " present patented shape. He did not finish it in my " shop, but showed it to me when it was finished.

" Q. 12. What was it you saw him crimp in ?

" A. It was a cone-shaped piece of metal.

" Q. 13. Was the bottom in each of those hods closed " in; I refer to the one with the patch and also the one " with the rivet ?

" A. Yes, sir.

" 14 Q. State, if you know, why Mr. Hoff changed " his plan of construction, shown in the Iron-clad hod, " to that shown in the Hoff hod ?

" A. He requires no riveting or pieces to make an " entire closure, and besides it has three layers of iron " uniformly divided around in the bottom. Such is " not the case in the Iron-clad hod. It has a single " layer, which is easily broken by coal. That is all I " can say about that."

Clearly, the first forms of hod that Hoff made were nothing more than what Reynolds had done several years earlier. It was not until some time after the first experiments (Rec., p. 21) that he devised what the witness calls "the present patented shape" which, as will be seen, is a coal hod formed out of a blank made in the shape of a *complete* cone, in which are formed, after rolling, *annular* crimps which, after folding down, convert the cone blank into a complete hod.

Clearly, Hoff abandoned, as disadvantageous, the form of structure which Reynolds had previously devised, and threw away the experimenlal hods so made as "waste material" (Rec., p. 16, Q. 14), and adopted "the present patented shape," because it "requires no "riveting or pieces to make an entire closure, and be-"sides it has three layers of iron uniformly divided "around in the bottom."

These latter features his earlier abandoned structure did not have, nor did the Reynolds models, nor do the defendant's hods exhibit the same.

1883. In December of this year one of Hoff's hods, made in the form illustrated in his patent, was shown to Mr. Hinman, an officer of the defendant, in Cincinnati, and Hinman had one of the Hoff hods sent to him for the purpose of submitting it to his practical workmen, with a view of seeing whether it could be manufactured with practical economy (Rec., pp. 33, 34, Qs. 5–12), so that a contract or license could be taken from Hoff.

There is no proof that the Hoff hod had then been, or was ever manufactured to any considerable extent, or that it ever could be manufactured with practical economy. On the contrary, the uncontradicted evidence is that as soon as the Hoff hod was shown to Reynolds by Mr. Young, Reynolds recognized the fact that the hod he had invented and made the models of in 1879, was commercially better and more practical. Mr. Young's evidence on this point, is as follows (Rec. p. 38):

"14 Q. How long was this hod at the factory?

"A. About two weeks.

"15 Q. Where was it during that time?

" A. In my office, behind my desk.

" 16 Q. Did Mr. Reynolds examine it while it was there ?

" A. He did.

" 17 Q. And did he make the examination in your office ?

" A. He did.

" 18 Q. How much of an examination of it did he make ?

" A. Well, he merely picked it up, looked it over, and set it down again.

" 19 Q. Did he say anything to you about it ?

" A. I can beat that hod all to pieces by those models that have been lying up in Ed.'s office so long.

" 24 Q. Who is the " Ed.'s " referred to in your answer to the 19th question ?

" A. Edward Peacock, formerly of the tin shop at the factory of the Iron Clad Manufacturing Company."

Reynolds says that on seeing the Hoff hod he at once told Mr. Young (Rec., p. 29, Q. 33) " that the hod " that I had could be made cheaper than the one " that was shown me, from the fact that it would " not take so much material to make it."

The Hoff hod was only under examination a few minutes (Young's evidence).

Reynolds :

" 34 Q. How long did you examine this hod like the Hoff hod at that time ?

" But a very few minutes.

" 35 Q. What became of it after that, if you know ?

" A. I don't know what became of it after I left it in the office at the factory.

" 36 Q. Did Mr. Young, or any one else, until to-day ever show you a hod like the Hoff hod ?

" A. I saw it two or three days ago for the first time since Mr. Young showed it to me. That was last Friday when Mr. Webb showed it to me in his office.

"37 Q. With this exception, please answer the 36th question?

"A. No, sir; they did not."

As a result of the examination of the Hoff hod at the factory, Mr. Shepard, president of the defendant company, reported upon it to Mr. Hinman, who had procured it from Hoff, that it would be impracticable on account of the expense, and that defendant's superintendent had a better hod.

On this point Mr. Hinman's testimony is as follows (Rec., pp. 34,35, Qs. 13–15):

"The first time that Mr. Shepard, the president of "the Iron Clad Company, came from the factory, he "told me that Henry Reynolds had a hod which would "knock this higher than a kite."

And again:

"Mr. Shepard, I think, told me that it would be impracticable to make on account of expenses—that is, "to make it according to the drawings Mr. Hoff sent "us. The iron would have to be rolled so wide that it "would cost so much more than the ordinary merchant "iron that it would be impracticable."

Mr. Hinman then returned the hod to Mr. Hoff, declining to take any interest in the patent or manufacture the hod on a royalty, writing a short letter stating "that we did not think it a practical thing to make" (Rec., p. 36, Q. 25).

1884. In May, 1884, the defendants commenced to put upon the market coal hods made in accordance with the Reynolds plan of 1879, and they obtained a patent for such hod on August 26th, 1884.

SECOND POINT.

The defendants did not copy Hoff's ideas.

The complainants, in the Court below, sought to prejudice the Court against the defendants by the allegation that they derived the idea of their hod from inspection of the Hoff hod.

Undoubtedly, the facts show that the attention of the defendants was *re*-directed to the matter of manufacturing coal hods in which the bottoms were in part made from the same material as the sides by learning that some Hoff hods had been made, and might, perhaps, therefore, compete with the previous style of hods that they had been making; but it is equally clear that the hod which they, in fact, made, was founded on ideas which had been conceived and put into shape long prior to the invention of Hoff, and that what they did was *not* to copy Hoff's idea, but simply to recur to and carry out *their prior existing* invention.

It is needless to say that no prejudice should attach to them on this account.

If they knew of the Hoff patent at the time that the Hoff hod was shown to them they had a perfect right to make coal hods which did not infringe its claims, and they had a perfect right to seek to *evade* the claims of the patent.

Every one has the right to *evade* a patent claim. The only prohibition is against infringing it. The description which a patentee annexes to his patent is not only designed to instruct others how to practice the invention, but also to point out the *limits* which the patentee has put upon it. Any one has a right to go outside those limits, and is entirely justified in accomplishing the same result outside of them.

In this instance the defendants made a hod which *clearly is not*, and which the Court below adjudged *is* *not*, the Hoff hod, and one that does not infringe Hoff's claim (the 2d) for his article of manufacture, and defendants were certainly justified in believing that they had a right in making the hod, which they did make, according to their own prior conception, by following the process of manufacture which had been previously tested by them in making the Reynolds models, and which they had every reason to believe they had a right to follow, not only from their own prior use of it, but from their knowledge that it had been used long previously in the manufacture of the "Zinc cylinders."

It will be noticed that the patent the defendants obtained in August, 1884, clearly differentiates their *article* from the "Zinc cylinder," but contains no claim for any process of manufacture, because as *a process* their process of manufacture was substantially the same as that followed in forming the folded in ends of the "Zinc cylinders."

It is to be noticed, also, that the plan or process that the defendants adopted was the very plan that Hoff *had abandoned*, as disadvantageous before adopting his present plan.

There is, however, no proof that the defendants saw the Hoff patent, except the drawings, and as they did not copy his *article* there is no reason to suppose that they had the slightest idea that he had any claim for any *process*.

THIRD POINT.

Prior State of the Art.

The prior state of the art is exhibited in the "Zinc cylinders" already referred to; in the English patent of Hazeltine, No. 3578, of 1873 ; in the patent of George Smith, dated February 27th, 1872, and of E. F. O'Toole, dated May 22d, 1877, and I. F. Kearns, dated January 22d, 1878, and the Clark and Wells patent of November 11th, 1879.

From these several patents it appears,

FIRST. That it was not new to make coal hods out of a single conically-shaped piece of sheet metal. (See Smith patent No. 124,093, dated February 27th, 1872, Rec., pp. 61, 62.)

SECOND. That it was not new to crimp a sheet of metal forming the body of a coal hod so as to give, by means of such crimps, proper shape to the body. (See O'Toole Patent No. 191,071, dated 22d day of May, 1877, Rec., pp. 62, 63.)

THIRD. That it was not new to strengthen or reinforce the bottoms of tin vessels having sloping sides by forming in such bottom an annular flat fold, so as to bring three thicknesses of metal in close contact with each other, to resist wear at the bottom. (See Kearns' patent of January 22d, 1878, Rec., pp. 98, 99.)

> This Kearns patent has been criticised by the expert for the complainant (Rec., p. 74) on the theory, on his part, that the circumferential crimps can only be put into the bottom by *stretching* the flat metal at the bottom, after the pan had been otherwise finished and made of the same depth as when shown completed in the drawings.
>
> This is, however, an entire misapprehension.
>
> Perhaps that process might be followed, but the simple and obvious mode of making the circumferential crimp in the bottom would be to form it identically in the way in which similar folds are shown as formed in the complainant's patent.
>
> This may be illustrated on the below diagram, in

which figure 1 represents the pan as it is first stamped out, figures 2 and 3 represent pan as the crimp is being bent up, the dotted lines showing the original outline; and figure ~~3~~ 4 represents the complete article in the exact form as shown in figure 2 of the Kearns patent.

Fig. 1.

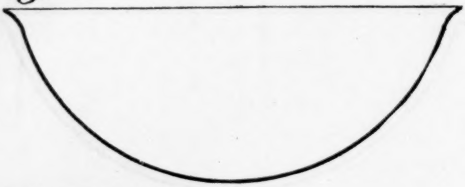


Fig. 2.

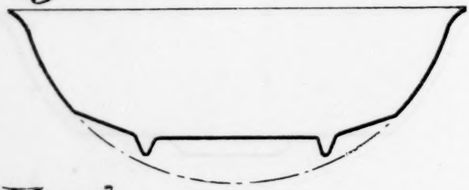


Fig 3.

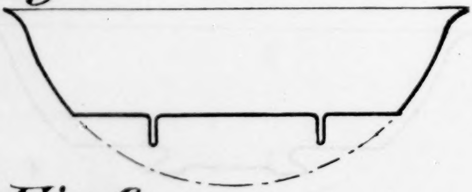
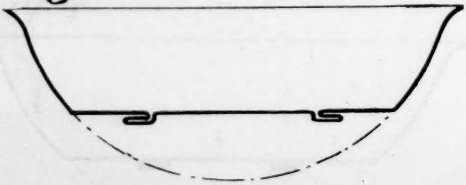


Fig. 4.



FOURTH. It was not new to form the sides and bottom of cylindrical and other vessels out of one piece of metal in such manner that the bottom, while being integral with the sides should at the same time be made thicker and stronger by the folding over upon itself, in *radial* crimps, of the material bent in to form the bottom. This was shown in the mode of forming the ends of the old zinc cylinders; was exhibited in the mode of partially forming the bottom of sloping side, metallic baskets, in the Clark and Wells patent of November 11th, 1879 (Rec., pp. 99–101), and was applied in the manufacture of "cylindrical and *other* boxes, cases, *cans* and similar vessels" in the English patent of Hazeltine, No. 2578 of 1873 (Rec., pp. 108–114). (The *italics* are ours.)

The Clarke and Wells patent is criticised (Rec., p. 74) on the ground that the flared or inwardly sloping-sided form is given by crimping the side metal of the basket before the bottom edge is turned over to partially form the bottom.

But as we shall show, the process of giving to the vessel the sloping-sided form is wholly immaterial. No valid patent can be taken upon a process which consists of folding in the sides of vessels which have been made to slope by one old and well known mode of manufacturing, if the same process of folding in had been previously applied to the sides of a vessel which had been made to slope in by another process. It is also wholly immaterial whether the sides be sloped at all.

The Clark and Wells patent is also criticised by the complainant's expert (Rec., p. 74) on the ground that the bottom of the basket is not one which is made by folding over and crimping in the lower part of the sides, but is made by the insertion of a separate piece.

It is quite true that the principal part of the bottom is made by the insertion of a separate piece, but it is also true that the circumferential portions of the bottom are made by folding in the lower part of the sides and crimping the material into flat folds.

The patent uses the following words: "The bot-" tom edge is turned *inward* and over as shown at " *e*, and *flattened* to form a joint with the turned " edge of the bottom B, or, in other words, making " a double seam. By this seaming of the body to " the bottom the *corrugations are crimped into flat* " *folds, giving extra wearing thickness at the bot-* " *tom*." (The *italics* are ours.)

It is clear, therefore, that the patentees had in mind the idea of strengthening the circumferential portions of the bottom by folding the turned in portions of the sides into flattened folds.

That the *whole* bottom is not made in this way is immaterial, in view of the fact that *the same is true* (though to a different extent) in the case of the defendant's structure.

The Hazeltine patent is criticised by the complainant's expert (Rec., pp. 74, 75) on the ground that he supposes that *paper* is the material intended to be operated upon by the process described in it, and that the body whose sides are crimped is a cylindrical body and not a cone-shaped body.

The last consideration we shall deal with under the next head.

The first criticism is clearly unfounded.

The Hazeltine patent does fairly show that *metal* is one of the materials contemplated to be used.

Indeed, the complainant's expert, himself, when he first speaks of the Hazeltine patent (Rec., p. 74), says, referring now to English Patent 3578 of 1873, I find it relates entirely to cylindrical vessels whose projecting side *metal* is crimped to support the bottom, &c. (the *italics* are ours).

It is not necessary that the word "metal" should be actually expressed in the patent. If other terms are employed which necessarily or fairly imply the use of metal that would be sufficient.

The English patent in its preamble says that "it is an invention for improvements in cylindrical "and other boxes, cases, *cans* and similar vessels" (even the complainant's expert admits, though reluctantly, that the word "can" necessarily implies the use of *metal* (Rec., p. 85, Q. 52).

And again it says: "The first part of this in-"vention relates to making a box of *any suitable* "*material* by crimping or folding a portion of a "previously prepared tube or hollow cylinder in "such a manner as to form the closed ends "thereof."

"SECOND. To upsetting a portion of a box form-"ing thereby a flange or ring.

* * * * * *

"SEVENTH. To a new article of manufacture, "consisting of a box or *vessel of any suitable ma-*"*terial* whether constructed by folding, *swaging or* "*pressing.*"

These terms naturally imply the use of metal. The patentee, by using such terms, instructed the public thereby to use "any suitable material," and especially indicated as such material one which "could be upset" and "swaged."

No material but metal could answer these conditions.

It is not an answer to these statements to point out that the patentee speaks in one place of the use of paste; this only shows that he *also* may have had *paper* in mind as a suitable material.

It is quite fair to believe that the patentee did have in mind the possibility of using paper, but it is equally true, and is indicated to the reader of his patent, that metal was one of the suitable materials to be used.

FOURTH POINT.

In view of the state of the art, the defendant does not infringe.

The first claim of the complainant's patent is in the following :

1st. " The method of forming the body of a coal hod " or other similar vessel, which consists substantially, " as before set forth, in first forming a cone-shaped " body from a suitable blank, then folding in the cone " end of said body in crimps to form the bottom."

Leaving out of view, for the moment, the question whether the particular method of forming the cone-shaped body is a material part of the claim, we submit that *only one method* of folding the cone end of the body into crimps to form the bottom, is shown or described. That method is indicated in the following words :

" After the seam has been made the partially formed " blank, Fig. 3, is placed upon a former having its end " grooved or turned off in steps below the line *xx*, as " shown in dotted lines, Fig. 3. Then by suitable " clamping jaws the metal in the lower end of the " blank is pressed to the shape of the former, commencing at the upper edge or groove, and successively pressing the metal into each groove in the " former until the lower one has been pressed in. " After this operation has been performed the blank " having the partially folded bottom is placed and

" clamped upon a former, the exact shape of the in-
" terior of the hod, the exterior clamping device grasping
" in the body of the hod just above the line *xx*. Then,
" by subjecting the partially crimped bottom to the
" action of a plunger, the crimps are folded down flat,
" as shown in Fig. 4, thus completing the body of the
" hod."

Now, though it is quite true that the patentee does state in general terms :

" I do not desire to limit myself to any particular form of crimp or fold for the bottom of the hod."

Yet general expressions of that kind are entitled to very little weight in construing a patent. The patentee is bound to point out and describe his invention and teach the public how to practice it.

It will not do for him to describe a particular and special *methods*, as in this case, which consists of *successively* pressing the metal which is to form the bottom by means of clamping jaws into the shape of a former, which is constructed with grooves or steps on its surface, and then flattening down the angular ribs or rings, thus formed, by means of an exterior clamping device and plunger, and then specifically claim *this* " method " " substantially as before set forth," and yet insist that another method is substantially his, which neither uses a grooved former nor clamping device, nor successive pressure of the metal into successive annular grooves, nor an exterior clamping device nor a plunger (for none of these things are shown to have been used by the defendant), simply because the specification contains a loose general expression to the effect that the patentee " does not desire to limit 'himself' to any particular form of crimp or fold for the bottom."

The defendant makes his bottom by radial folds, which do not require such a former as Hoff's nor clamping jaws like Hoff's, nor any successive pressing of the metal into grooves ; nor, so far as proved, any exterior clamping device or plunger.

Whatever variations are allowable in the particular form of the Hoff crimps or folds must be variations which permit Hoff's " method " being followed.

Loose, general descriptions will not expand a claim so specific as is this

The claim of a patent may be illustrated but it cannot be " enlarged especially by language used in other parts of the specifications."

Railroad Co. vs. Miller, 104 U. S., 112.
Greenleaf vs. Yale Co., 117 U. S. 554.
Keystone Bridge Co. vs. Phœnix Co., 95 U. S., 274.

This proposition would be true whether the state of the art were what it is or not.

But the state of the art does not permit of any such broad construction of the complainant's claim as to include the defendant's device.

The only point of material similarity between the defendant's method and that of complainant was defined by the Court below in the former decision (Rec. p., 64) in the following words :

" The patentee was the first to perceive the advan-" tage of making a coal hod in which the sides and bot-" tom should be formed out of one piece of metal in " such a manner that the bottom, while being integral " with the sides, should at the same time be thicker and " stronger than the sides, in order to sustain the extra " wear to which it is subjected in use."

The defendant " availed himself of that feature of the " patent which consists in using the same piece of metal " to form the sides and bottom, so that the bottom will " be of an increased thickness of metal."

At the time this decision was rendered the state of the art, as exhibited to the Court, showed (with the exception of the " old zinc cylinders," which were apparently overlooked) only that paper vessels—such as cartridge shells—had been made by folding in the paper which formed the sides in radial folds so as to make the bottom; but obviously in the use of such material as paper there was no idea of strengthening the bottom or giving it greater capacity to resist wear by the folding of the material. Its fragile nature, perhaps, excluded such conception.

It clearly appears, however, by other exhibits subsequently introduced, that the folding in of the same material which forms the sides into flattened crimps to form the bottom, and for the very purpose of strengthening the bottom, had been described in the prior patents.

The Hazeltine patent clearly describes this process as applied to a cylindrical vessel made of any suitable material, and it suggests metal by its phraseology.

The Kearns patent describes the advantages which result from doubling metal into folds on the bottom, and even describes forming an annular flattened fold in the bottom of the vessel, "so at the fold there are "three thicknesses of metal in close contact to resist " wear at this exposed point."

The Clark & Wells patent speaks of corrugating the sides of a metal body so as to make it "gradually " decrease in width and increase in depth toward the " bottom," then turning the bottom edge inward and over, and seaming in the central piece, saying: "The " corrugations are crimped into flat folds, giving extra " wearing thickness at the bottom."

Clearly, therefore, it now appears that the patentee was not the first to perceive the advantages of making either a cylindricnl or a tapering-sided vessel, in which the sides and bottom should be formed out of one piece of metal in such a manner that the bottom, while being integral with the sides, should at the same time be thicker and stronger than the side, in order to sustain the extra wear to which it is subjected in use.

It will not help the complainant to say, as his expert does, that the Hazeltine cans were made by practicing a process upon a *cylindrically* formed body, while the patentee's hods are formed upon a tapering-formed body.

The *process* is identical in each case.

It is a little *easier* to apply the process upon a tapering shaped body than upon one with parallel sides like a cylinder, because the direction of inward bending *is already partly given* by the tapering form of the body.

But it cannot be true that a person can lawfully patent, the process of bending in the sides of a metal vessel so as to form the bottom, when and because practiced upon a tapering shaped body, after it appears that the same process had been previously applied upon a cylindrical body. Particularly when it was actually *easier* to apply it upon the tapering shaped body than upon the form of the body on which it was previously used.

Indeed, as appears from Reynold's evidence, it was the old "zinc cylinders" and the method in which their ends were formed that naturally suggested applying the same process to the coal hod form of body.

It cannot be said, therefore, that the use of the process on one form of body would not suggest its use on the other form, for, in the case of the defendant, such was precisely what the older instance of use *did* in fact suggest.

Nor will it help the complainant to say, as his expert does, that the process when applied to a tapering formed body is more beneficially used there, than it would be when applied to a cylindrical body, for the reason that in the tapering body there is not so much material to be crimped in at the centre as there is in the case of the cylindrical body (Rec., p. 74.)

This is only one of the reasons why it is easier to apply the process on one occasion than on the other, but it does not alter the character of the process.

The product is no better for having less metal in the bottom. On the contrary, the more metal there is folded over the greater is the amount of space covered by the three thicknesses, and, therefore, the greater the capacity to resist wear.

Even if the resulting vessel were a little better on that account the difference would be one of degree only.

Even with all the differences pointed out by the complainant's expert the case falls clearly within the conditions under which this Court has determined that a patent is *not valid.*

" The mere carrying forward or new or more extended
" application of the original thought, a change only in
" degree doing substantially the same thing in the same
" way, by substantially the same means, with better
" results, is not such an invention as will sustain a
" patent."

Smith vs. Nichols, 21 Wallace, p. 112.
Burt vs. Every, 133 U. S., 349 and cases there cited.
Bussel Trimming Co. vs. Stevens, 11 Sup. Ct. Rep., 150.

" The application of an old process or machine to a
" similar or analogous subject with no change in the
" manner supplying it and no result substantially dis-
" tinct in its nature, will not sustain a patent even if
" the new form had not been contemplated."

Pennsylvania Co. vs. Locomotive Truck Co., 110 U. S., 290.
Miller vs. Foree, 116 U. S., 22.
Blake vs. San Francisco Co., 113 U. S., 679.
Gardner vs. Herz, 118 U. S., 180.
St. Germain vs. Brunswick, 135 U. S., 230.

The second claim is in the following words :

" 2. As a new article of manufacture a coal hod
" formed of a single piece, and having its bottom
" crimped and folded to form a series of annular ribs
" or rings of progressively increasing diameter, sub-
" stantially as shown and described."

This claim needs little consideration. It was not infringed. The defendant's hods were *not* made of "a *single piece*," *nor* did they have "*annular* ribs," *nor* rings of "progressively increasing diameter."

FIFTH POINT.

The complainant's patent is, in view of the evidence, invalid.

We have shown that the Hoff patent cannot now be construed to include either the *method* or the *article* of the defendant.

If it can be held valid at all, this can be only if it be limited strictly to the exact method described for making a coal hod, by taking a blank shape so as to make a *complete cone* shape and then forming in it a *series of annular* crimps of progressively smaller size, and then flattening them down by the instrumentality described so as to form a *complete* bottom.

The complainants have insisted that their patent has *not* this limited construction, and if they are held to the construction they themselves insist upon (as has sometimes been held should be done), it is clear that it is invalid on the principles above stated.

But even upon the most restricted interpretations that can be given to it, it would seem to be anticipated by the patent of Kearns of 1878.

As already pointed out, it seems plain and obvious that the most natural mode of making the annular crimps in the bottom of the Kearns pan would be by bending in the metal exactly as Hoff does it. The similarity is illustrated in the sketches heretofore referred to.

If this be so, there could hardly be any patentability in making several crimps instead of one, or in forming crimps in the lower part of a tapering body formed by rolling (that method being old), when a similar crimp had been formed in the body of an analogous vessel formed by stamping.

The complainant, in view of the present evidence cannot advance a single theory to support his patent with a construction broad enough to include the defendant's structure without encountering a sufficient answer.

Thus :

1st. He cannot claim, as was contended, that he was the first to form the bottom out of the same metal which forms the sides by crimping or folding the same in—

Because such process is found described in the Hazeltine patent of 1873, in the Clark & Wells patent of 1879, and was used in making the "zinc cylinders."

2d. He cannot save his patent by saying that his process is limited to bending in the bottom of "coal-hods,"

Because the patent itself says that his invention "is applicable to buckets, scoops and many other vessels of sheet metal."

3th. He cannot save his patent by saying that his process is limited to operating upon a "cone-shaped" blank,

Because the defendant does not use such a blank, and

Because even though his blank may have differed in shape from others which preceded it the patent itself says : "To change the blank to make a different form "would be the work of a mechanic and require no invention," and

4th. He cannot save his patent by saying that his process is limited to operating upon *tapering* sided vessels,

Because the prior patent of Clark & Wells and of Kearns show both annular and radical crimps folded in and flattened down to strengthen the bottom, and

Because, The *process* is the same whether practiced upon cylindrical or tapering bodies, and any differences are merely of *relative* ease in practicing it, or relative degree of perfection in the result.

SIXTH POINT.

The decree of the Court below dismissing the bill was, therefore, correct, and should be affirmed with costs.

Frederick H. Betts,
Ernest C. Webb,
Of Counsel.

139-331

139-331

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 224.

THE STEAM CANAL-BOAT "SYDNEY," HER ENGINES, &c. AND THE CANAL-BOAT "WILLIAM WORDEN," HER TACKLE, &c.—CHARLES E. WAGER, CLAIMANT, APPELLANT,

vs.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY OF PROVIDENCE, RHODE ISLAND, AND THE SECURITY INSURANCE COMPANY OF NEW HAVEN, CONNECTICUT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 13, 1887.

cess is limited to operating upon *tapering* sided vessels,

BECAUSE the prior patent of Clark & Wells and of Kearns show both annular and radical crimps folded in and flattened down to strengthen the bottom, and

BECAUSE, The *process* is the same whether practiced upon cylindrical or tapering bodies, and any differences are merely of *relative* ease in practicing it, or relative degree of perfection in the result.

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1. Circuit Court of the United States for the Southern District of New York.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY OF PROVIDENCE, RHODE ISLAND, and THE SECURITY INSURANCE COMPANY OF NEW HAVEN, CONNECTICUT, Libellants and Appellees,

vs.

THE STEAM CANAL-BOAT "SYDNEY," Her Engines, &c., and the CANAL-BOAT "WILLIAM WORDEN," Her Tackle, &c., whereof CHARLES E. WAGER is Claimant and Appellant.

Bill of Exceptions.

This cause came on for trial before the Honorable William J. Wallace, judge of the circuit court of the United States for the southern district of New York, at a term of said circuit court held in the United States circuit court room, in the post-office building, New York city, on the 28th day of October, 1885, on the appeal by the libellants from the final decree of the district court of the United States for the southern district of New York dismissing their libel against the above-named vessels, with costs. Counsel for the libellants read the libel as follows:

2 To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

The libel and complaint of the Providence Washington Insurance Company of Providence, Rhode Island, and the Security Insurance Company of New Haven, Connecticut, against the steam canal-boat "Sydney" and her consort, the canal-boat "William Worden," and their tackle, apparel, etc., and against all persons lawfully intervening for their interests therein, in a cause of collision, civil and maritime, alleges as follows:

First. Your libellants are foreign corporations, but carry on the business of general marine insurers in the State of New York under the name and style of the New England Underwriters.

Second. The aforesaid steam canal-boat "Sydney" and her said consort, the "William Worden," are now in the harbor of New York and within the jurisdiction of this court.

Third. That heretofore, to wit, on or about the 17th day of May, 1883, the said canal-boat "Sydney" and her consort, the boat "William Worden," which then were and now are owned by the same persons and which then were and now are engaged in the business of common carriers to and from the cities of New York and Buffalo by way of the Erie canal and the Hudson river, left the port of Buffalo for the port of New York, having on board, with other merchandise, a cargo of wheat, consisting of seven thousand nine hundred (7,900) bushels and of the true and lawful value of $9,211.75, consigned to Armour, Plankinton & Company, of New York, the owners and consignees thereof.

3 These two boats were and practically are but one vessel, the boat "Sydney" being furnished with an engine and propeller and furnishing the motive power both for the other boat and herself, and the boat "Wm. Worden" being without masts, sails, or any motive power and entirely dependent on the "Sydney" in navigation.

When this trip was begun and during the partial performance of it these two boats were fastened together, as is always the case when making a voyage, the stern of the "Worden" being fastened to the bows of the "Sydney" and pushed directly ahead by the "Sydney," and forming one vehicle some 200 feet in length.

Fourth. The trip thus begun by these boats was carried on with comparative safety until Tuesday, the 29th day of May aforesaid, when the said boats run aground on an island in the Hudson river called Esopus Island, whereby the boat "Worden" was so damaged that she almost immediately sank in deep water, and the cargo aforesaid which was on board the "Worden" became a total loss.

More particularly, Esopus Island is in the Hudson river, about midway between Poughkeepsie, on the north, and Kingston, on the south.

At about ten o'clock in the night aforesaid, which was a clear and starlit night, through the gross carelessness of the person or persons in charge of the boats aforesaid, the "Worden" was driven upon the rocks on the north end of the island aforesaid and was sunk.

Your libellants allege general mismanagement on the part of the persons in charge of the said boats, the island being a well-known obstruction, easily to be avoided, a wide expanse of water on either side fit for navigation, protected by buoys and a light-house.

4 Fifth. On the date above mentioned, to wit, the 17th day of May, 1883, your libellants did, by one certain policy of insurance, insure and agree to indemnify against loss the aforesaid Amour, Plankinton & Company, the owners and consignees of the aforesaid cargo of wheat, against the usual marine risks and perils of the voyage from Buffalo to New York, and pursuant to the said policy of insurance did, on the occurrence of the loss and damage aforesaid, accept from the insured, Armour, Plankinton & Company, an abandonment of the said cargo as for a total loss thereof, and thereupon did pay to the said insured the true and lawful sum of $9,211.75, and thereby became subrogated to all the rights, claims, and demands of the said Armour, Plankinton & Company for the loss and damage aforesaid against the said steam canal-boat "Sydney" and her said consort, the canal-boat "Wm. Worden," their owner or owners.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore your libellants pray that process in due form of law, according to the course and practice of this honorable court in cases of admiralty and maritime jurisdiction, may issue against the said steam canal-boat "Sydney," her tackle, engines, &c., and against the said canal-boat "William Worden," her tackle, apparel, and furniture, and that all persons having or claiming to have any right, title, or interest in the same may be cited to appear and answer on oath all and singular the matters aforesaid, and this honorable court would be pleased to decree the payment of the claim aforesaid, with interest and costs, and that said vessels, their tackle, &c., may be condemned and sold to pay the same, and that your libellants may have such other and further relief in the premises as in law and justice they may be entitled to receive.

5 SOUTHERN DISTRICT OF NEW YORK, *ss:*

S. G. Smith, being duly sworn, says that he is an agent of the libellants herein; that he has read the foregoing libel and the same is true; that the reason this verification is made by deponent and not by the libellants or either of them is that said libellants are foreign corporations and none of their officers are now within this district.

S. G. SMITH.

Sworn to before me this 12th day of July, 1883.

THOS. J. DE LANEY,
[L. S.] *Notary Public, Kings County.*

Cert. filed in N. Y. Co.

6 The counsel for the claimants reads the answer to the said libel and claim of owner.

7 *Answer.*

To the Hon. Addison Brown, judge of the district court of the United States for the southern district of New York:

The answer of Charles E. Wager, intervening for his interest as owner and claimant of the steam canal-boat "Sydney" and the proceeds of her sale in the registry of this court and the canal-boat "William Worden," their tackle, &c., to the libel and complaint of the Providence Washington Insurance Company of Provi-
8 dence, Rhode Island, and the Security Insurance Company of New Haven, Connecticut, against the said steam canal-boat "Sydney" and the said canal-boat "William Worden," their tackle, &c., in an alleged cause of collision, civil and maritime, alleges and respectfully shows to this honorable court as follows:

First. Claimant admits the allegations in the first article of said libel and complaint contained.

Second. Claimant admits that at the time of the filing of the libel and the seizure of said steam canal-boat she was in the harbor of New York, and that at the time of the filing of the libel and the bonding thereunder the said canal-boat "Worden" was also within this district, and that both vessels were within the territorial jurisdiction of this court.

Third. Claimant admits that at the times allleged in the libel he was the owner of the said steam canal-boat "Sydney" and the

said canal-boat "Worden," and that said vessels were engaged in the business of common carriers to and from the cities of Buffalo and New York by the way of the Erie canal and the Hudson river. Claimant admits that the said canal-boat "Wm. Worden" and said steam canal-boat "Sydney" left the port of Buffalo for the port of New York about the 18th day of May, 1883, and the "Worden" had on a cargo of seventy-nine hundred bushels of wheat, of the value of nine thousand two hundred and eleven $\frac{75}{100}$ dollars, and that the said steam canal-boat "Sydney" had on a cargo of seven thousand eight hundred bushels of corn. Claimant admits that the said cargo of wheat on the said boat "Worden" was consigned to Armour, Plankinton & Company, of New York, but denies that the said cargo of corn on board the "Sydney" was consigned to
9 said Armour, Plankinton & Company, and alleges that the cargo on the said steamboat "Sydney" was consigned to other parties in New York.

Claimant denies that the two said vessels were or are practically one vessel, and alleges that the two said vessels are practically and in every particular separate, distinct, and independent vessels, and that the said steam canal-boat "Sydney" had the said canal-boat "Worden" in tow, and that the relation of the two vessels was that which exists under the ordinary towage contract between a tow-boat and her tow, and that the only difference between the said two vessels and other tow-boats and their tows was that the said steam canal-boat "Sydney," for convenience and safety of navigation, placed the "Worden" ahead of her and propelled her in that manner rather than astern on a hawser or close up or alongside.

Claimant admits the two vessels were fastened together as set forth in the libel and complaint, and that the "Sydney" furnished the motive power, and that the said boat "Worden" was without masts, sails, or any motive power and was entirely under the control and management of the said steam canal-boat "Sydney" at the time of the occurrence of the damages set forth in the libel.

Fourth. Claimant admits that the said steam canal-boat "Sydney" and her said tow, the said canal-boat "Worden," proceeded from the port of Buffalo with said cargoes on the date above mentioned, and proceeded with safety until they arrived at Troy, N. Y., when, by reason of being about to enter the Hudson river and as a matter of precaution, claimant caused the boiler on said steam canal-boat to be thoroughly examined and repaired and tested, and then proceeded on and entered the river, and proceeded with safety
10 till about 12 o'clock at night on the 29th day of May, at which time said "Sydney" and her said tow had arrived at a point in the river about one mile below Esopus light, when, without any warning and when the said steam canal-boat "Sydney" and her tow were proceeding in the channel at a proper and safe distance from Esopus Island and the opposite shore, going to the westward of the island, the under flues under the boiler of said steam canal-boat "Sydney" suddenly burst, and the steam dropped from sixty-five pounds to twenty-five, as shown by the indicator; that thereupon the steamer was unable to keep her course by reason of want

of sufficient power to give her steerage-way, and the said boat "Worden" struck the rocks on the north end of the island and sunk in the manner and under the circumstances hereinafter set forth, and not otherwise. Claimant denies that said collision of said boat "Worden" with the rocks and the sinking thereof were occasioned through any fault, negligence, inattention, or want of care or skill on the part of any person or persons, and especially denies that it was occasioned by the negligence, mismanagement, or want of care or skill on the part of the said tow-boat "Sydney," her captain and crew, and alleges that the said collision with the rocks and sinking of said boat "Worden" and her cargo were unavoidable and uncontrollable contingencies, as hereinafter more fully set forth, and not in any way attributable to any lack of forethought, care, prudence, skill, or seamanship on the part of the claimant and the captain and crew of said steam canal-boat "Sydney" or the claimant and the crew of the said canal-boat "Worden;" that the said island and rocks are well known, and, except in cases and under contingencies and circumstances such as hereinafter set forth, are easily avoidable by tow-boats and their tows.

11 Fifth. Claimant denies that on the 17th day of May, 1883, or at any other time the libellants herein did insure by one certain policy or any other policy of insurance and thereby agreed to indemnify the aforesaid Armour, Plankinton & Co., the owners and consignees of said cargo of wheat, against the usual marine risks and perils of the voyage from Buffalo to New York. Claimant denies that pursuant to such policy as set forth in the libel and complaint herein or any other policy the said Armour, Plankinton & Co. abandoned to the libellants herein the said cargo of wheat as or for a total loss or in any way whatsoever abandoned said cargo of wheat to the libellants or their servants or agents. Claimant further denies that he has any knowledge or information sufficient to form a belief as to whether the libellants herein paid to said Armour, Plankinton & Co. said sum of $9,211.25, and therefore leaves the libellants to such proof thereof as they may be advised.

Claimant further alleges that if the libellants have paid such sum for the loss of said cargo it has been paid under the policies and certificates hereinafter particularly referred to and for the benefit and to the credit of claimant, and not otherwise, as hereinafter particularly set forth. Claimant denies that the libellants herein, by reason of the payment of the said sum of $9,211.25 or any other sum for the loss of the said cargo of wheat in the premises, became subrogated to the rights and claims and demands of the said Armour, Plankinton & Company for the loss of said cargo, or became subrogated to the rights of any other person whatsoever or to any rights of any nature whatsoever against this claimant or the said steam canal-boat "Sydney" or the canal-boat "William Worden" or against any other person or thing.

12 Sixth. Neither admitting nor denying the jurisdiction of this court, claimant denies each and every the other allegations in said libel contained not hereinbefore specifically admitted or denied, and for a further answer herein alleges:

Seventh. That your claimant loaded on the boat "Worden," under the usual bill of lading, a cargo of wheat, at the port of Buffalo, N. Y., consigned to the port of New York, which bill of lading will be produced on the trial of this suit, and about the same date, to wit, the 17th day of May, 1883, your claimant loaded the steam canal-boat "Sydney," at Buffalo, under the usual bill of lading, a cargo of corn consigned to New York; that thereupon the steam canal-boat "Sydney" took the said boat "Worden" in tow to tow her to New York, and proceeded with said boat with safety till she and the boat "Worden" arrived in Troy, New York; that at Troy the boiler of the steamer was thoroughly examined and repaired and tested by competent machinists before proceeding into the Hudson river; that after such examination and repairs and tests your claimant proceeded on the voyage with safety and without any mishap or accident or trouble until said steam canal-boat and tow arrived in the said river off Esopus light, about 12 o'clock in the night of May 29th, 1883; that then and there, and while the said steamer and her tow were proceeding in the regular and usual channel and at a safe distance from said island and the opposite shore, and while your claimant and two other hands were on duty, without any warning, the under flues of the boiler of said steamer "Sydney" suddenly burst and the steam suddenly fell from about sixty-five pounds to twenty-five pounds, as was shown by the indicator and by the slowing down of the speed of the steamer; that there-
13 upon the said steam canal-boat became unable to manage herself and tow, and, by reason of the tide running full ebb with a heavy west wind, and the water, by reason of a freshet, being two feet higher than usual, the said steam canal-boat and "Worden" were carried sideways and eastward over toward Esopus Island, and when claimant observed that said boat and tow were being carried, as above, toward said island reversed the engine and commenced backing with all the power that could be got up, and thereby cleared the steam canal-boat from striking the rocks; that everything was done that could be done by claimant and crew of said steam canal-boat to prevent and avoid said collision; that the said collision with said rocks of the boat "Worden" and the sinking thereof was wholly occasioned by reason of the bursting of the flues of the boiler of the said steamboat "Sydney," and not by or through any fault, negligence, inattention, or want of care, forethought, skill, or seamanship on the part of your claimant, the captain and crew of said boat "Sydney."

Eighth. That, at the time and before the said collision, the said steam canal-boat was well and properly manned, and before the bursting of said flues of the boiler, as aforesaid, said steam canal-boat was well fitted, tackled, and equipped and in every particular seaworthy and fitted for the business in which she was engaged, and before and at the time of said collision the captain, your claimant, and two of the crew were up and on duty and properly stationed, and your claimant was on the lookout.

Ninth. Claimant, further answering, here alleges that he paid the premium for the insurance on the cargo of wheat lost on the boat

14 "Worden," and that such premium was paid by him to insure him against his liabilities as a common carrier, and that such premium was paid by him and his agents and servants with a distinct understanding and agreement with the shippers of said cargo of wheat and the libellants that, in case of any loss or damage to said cargo while *in transitu*, the payment of such loss or damage by the insurance company should be for and accrue to the benefit of your claimant and to relieve your claimant from his liability for such damage and losses as a common carrier.

That claimant paid such premium with the knowledge and consent of the libellants, their agents, servants, and employees, and in accordance with the well-established customs and practices now existing and having existed for twenty years past in the port of Buffalo, N. Y., between the libellants and other insurers and common carriers, whereby common carriers insured themselves against losses under and by virtue of their liability as common carriers for damages and losses to the cargoes shipped on board their boats.

That all and singular the premises are true.

Wherefore the claimant and respondent prays that this honorable court will be pleased to pronounce against the libel aforesaid, and to condemn the libellants in costs, and otherwise right and justice to administer in the premises.

C. E. WAGER.

Sworn to before me this 7th day of September, 1883.

DANIEL J. AUGUSTINE,
[L. S.] *Notary Public, N. Y. Co.*

HYLAND & ZABRISKIE,
Proc's for Claimant and Respondent,
30 *Park Place, N. Y. City.*

15 *Claim.*

At a special term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on Tuesday, the fourteenth day of August, in the year of our Lord one thousand eight hundred and eighty-three.

Present: The Honorable Addison Brown, district judge.

PROVIDENCE WASHINGTON INSURANCE COMPANY and Another
against
THE STEAM CANAL-BOAT "SYDNEY" and Her Consort, THE CANAL-BOAT "WILLIAM WORDEN." } 31237.

And now Charles E. Wager, sole owner of said vessels "Sydney" and "William Worden," intervening for the interest of himself in the said "Sydney" and "William Worden," appears before the honorable court and makes claim to the said vessels, etc., as the same are attached by the marshal, under process of this court, at the

instance of Providence Washington Insurance Company and another, and the said Charles E. Wager avers that he was in possession of the said vessels at the time of the attachment thereof, and that the person above named is the true and *bona fide* owner
16 of the said vessels, and that no other person is the owner thereof; wherefore he prays to defend accordingly.

C. E. WAGER.

Sworn to and subscribed this fourteenth day of August, A. D. 1883, before me—

[SEAL.]

DANIEL J. AUGUSTINE,
Notary Public, N. Y. Co.

HYLAND & ZABRISKIE,
Proctors for Claimant.

17 Libellants' counsel offers in evidence the bill of lading or agreement for transportation of the cargo, marked Ex. 1. Admitted.

18 (LIBELLANTS' EXHIBIT 1.)

B. L.

No. —. BUFFALO, *May* 17, 1883.

"Shipped by W. Meadows, in apparent good order, on board the canal-boat 'Wm. Worden,' of Morse, whereof ——— ——— is master, the following-described property, to be transported to place of destination without unnecessary delay, and to be delivered as addressed on the margin, in like good order, in the customary manner, free of lighterage, upon payment of freight and charges as prescribed in this bill; consignees to pay all harbor towing from and to the usual place of landing; three week days, regardless of weather (including day of arrival, providing notice of arrival shall be given before four o'clock p. m.), after arrival and notice of same, to be allowed consignees to discharge this cargo, after which time the cargo or consignees are to pay demurrage at the rate of two and one-half per cent. per day upon the freight, including tolls, for each and every day of such demurrage over the three days, as above specified, until the cargo is fully discharged; and it is agreed between the carriers and shippers and assigns that, in consideration especially of the rate of freight herein named, the said carriers, having supervised the weighing of said cargo in board, hereby agree that this bill of lading shall be conclusive as between shippers and assigns and carriers as to quantity of cargo received in board and to be delivered at port of destination, and that they will deliver the full quantity hereon named. All damage caused by the boat or the carrier, or deficiency in the cargo from quantity as hereon specified, to be paid for by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee. In case grain becomes heated while in transit the carrier shall deliver his entire cargo and pay only for any deficiency caused by heating exceeding five bushels for each one thousand bushels.

The freight charges or demurrage payable to as directed below or order, at place of destination, who is the only party authorized to collect the same, and whose receipt shall be in full for all demands on this cargo or bill of lading.

In witness thereof the said master of said boat hath affirmed to two bills of lading, one marked 'original' and one marked 'duplicate,' of this tenor and date, one of which being accomplished the other to stand void.

ARMOUR PLANKINGTON & CO.

7,900 bu. No. 2 red wheat, ex. cargo, schr. R. Hallaran.
Freight to New York five (5) cents per bu.
Advanced charges $200.

H. MORSE & CO.,
Per C. E. WOLFE.

(Seventy-nine hundred bushl.)

C. E. WAGER.

19 *B. L.—Continued.*

The freight charges and demurrage to the amount of $516.94 are payable by check to the order of the National Bank of the Republic, in New York, such check to be delivered to E. B. Brooke & Co. for such bank. The balance is payable to said E. B. Brooke & Co., who is the only party authorized to collect the same, whose receipt shall be in full for all demands therefor.

(New.)
(Eb. 28.)
Printed across face in red ink the word 'original.'

Endorsed: Armour, Plankington & Co., Whitlock."

Claimant's counsel offered in evidence the contract or policy of insurance, Claimant's Exhibit "A." Admitted.

20 "CLAIMANT'S EXHIBIT A."

Uniform Canal Cargo Policy.

The New England Underwriters,

The Security Insurance Co. of New Haven, Conn.,

The Providence Washington Ins. Co. of Providence, R. I.,

Each acting and contracting for itself and not one for the other, for the true performance of the premises, each company for its own part only, which is one-half of all liability accruing under this policy—

By this policy of insurance, on account of H. Morse & Co., for whom it may concern—

Do insure the several persons whose names are hereafter endorsed hereon as owner, advancer, or common carrier on goods, wares, merchandise, or country produce, on his own boats or boats belonging to others, loaded on commission or chartered—

From place to place, as endorsed hereon or in a book kept for that purpose, for the several amounts, at the rate, and on the goods, wares, merchandise, or country produce as specified in the said endorsement.

No risk considered as insured under this policy until said endorsement is approved and signed by these companies or their duly authorized agents at ——, unless with special agreement with the companies and endorsed thereon.

Beginning the adventure upon the goods, wares, merchandise, or country produce from and immediately following the lading 21 thereof at the port or place endorsed as aforesaid and continuing the same until the said goods, wares, merchandise, or country produce shall be safely landed at the port of destination as aforesaid; and it shall and may be lawful for the said boats to load in such a manner as is usual and customary for vessels employed in the navigation aforesaid to be laden without reference to any provisions on the same subject on marine law or custom applicable to vessels laden for sea voyages; five days allowed to discharge after arrival; no assurance to apply more than three days after lading while the boat is in port in which she is laden.

Touching the adventures and perils which the said insurance companies are contented to bear and take upon themselves on said trip or voyage, they are of the seas, canals, rivers, and fires and all other perils, losses, or misfortunes that shall come or happen to the hurt, detriment, or damage to the said goods, wares, merchandise, or country produce laden on board of said boats on the voyage or trip aforesaid, excepting perils, losses, and misfortunes arising from or caused by ice, jettison, theft, robbery, or barratry of the master or any of the crew of said boats, or from a want of ordinary care and skill (such as is common in said navigation) in lading or navigating said boats, and excepting also all losses arising from or caused by the said boats being unduly laden on the voyage or trip aforesaid.

It is hereby expressly understood and agreed that these companies will not be liable for loss or damage to any cargo during the loading of boat resulting from lack of proper caulking, nor for any loss or damage resulting from the spilling of cargo by careening of boat in consequence of carelessness or overloading.

Specie, bullion, jewels, bank notes or bills of exchange, deeds, bonds, mortgages, accounts, and all other evidences of debt, plate, medals, paintings, powder, piano-fortes, statuary, sculptures, and curiosities are not deemed to be included in any insurance unless specially mentioned in the policy and scheduled.

In case of loss or misfortune it shall be the duty of the captain 22 or crew or those having command to use the utmost diligence and attention to save the property until some agent of these companies shall arrive, and upon his arrival to assist him in the care and saving of the property, and neglect to do so will render the policy void, and it is understood there can be no abandonment of the subject insured, nor shall the acts of the insurers or their agents in recovering, saving, or disposing of the property hereby insured be considered a waiver or an acceptance of abandonment, nor as affirming or denying any liability under this policy, but such acts shall be considered as done for the benefit of all concerned, without prejudice to the rights of either party.

Immediate notice of the occurrence of all losses shall be given to these companies by the insured, and within thirty days from the time the same may happen the said insured shall deliver to said companies as particular an account thereof as the nature of the case will admit, stating the causes, if known, the extent thereof, and the nature of the interest of assured in the property; also what other insurance or assurances (if any) there was on said property at time of said loss, which statement shall be in writing, signed by the assured, and verified by his or their oath; and so much of said statement as relates to the cause, nature, and extent of said loss or damage shall be verified also by the oath of the master of said boat or vessel, or of some other person or persons having immediate charge thereof at the time the same did happen, otherwise these companies will not be liable under this policy; and the amount of loss shall be ascertained by the opening of packages, when necessary, by a competent person and separating the sound from the damaged portion, these companies being liable for the loss on the damaged portion only, which shall be ascertained by appraisement by disinterested persons, or by sale at auction, as these companies may prefer.

The said loss or damage to be estimated according to the true and actual cash value of the said property at the place of destination on the day of the disaster, and on the property not forwarded to 23 its destination the said loss or damage to be ascertained in the same manner, and the freight from the place of the disaster to the place of destination deducted, and these companies will pay such proportion of the said loss as the amount hereby insured bears to the sound value of property so insured, to be paid within sixty days after notice and proof of the loss and interest thereon shall have been made by the insured. In all cases of loss or damage there shall be deducted, in lieu of average, the sum of seventy-five dollars on losses on grain and general merchandise, and fifty dollars on flour and other cargoes, excepting salt, on which the average shall be one hundred dollars.

In case of loss all unpaid premiums to be deducted.

In the case of wet grain the dry portion in the boat (if any) to be considered as a sample of the condition and quality of the cargo when shipped.

No claims to be paid for damage to cargo from leakage through the decks or other coverings of the boat. It is also agreed that these companies shall not be liable for any loss or damage to bar, bundle, rail, rod, or hoop iron unless total, nor for damage to goods or property on deck unless by special agreement in writing endorsed on this policy. This policy shall not cover loss or damage resulting from explosion of gunpowder, from acids, lime, or matches; no loss to be paid for detention of boat or cargo or demurrage.

It is understood and expressly agreed that this policy does not

cover any damage from ice, and if the voyage is suspended or interrupted in consequence of ice for three consecutive days or more the trip risk shall cease and terminate at and from 12 o'clock at noon of the day the boat is stopped by ice; and in case the navigation of the canal shall during the trip be closed officially while the boat is on the canal the risk under this policy shall cease on the day the navigation is thus closed. Three days, however, next succeeding such stoppage and closing shall be allowed to discharge cargo, but any resumption of the voyage during the same season or the spring
following shall not revive the risk or revive the liability of
24 these companies under this policy. The premium charged
on any risk terminated by either of the above causes shall
be considered, notwithstanding, as fully earned.

And provided further, and it is hereby agreed, that if the said insured shall have already made any other insurance upon the premises aforesaid not notified to these corporations and mentioned in or endorsed upon this policy, then this insurance shall be void and of no effect; and in case of any other insurance on the premises hereby insured, whether prior or subsequent to the date of this policy, the insured shall not, in case of loss or damage, be entitled to demand or receive of these companies any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on the said premises.

And it is further provided and hereby agreed that if the said boats, upon a regular survey, shall be deemed unseaworthy or unfit to prosecute said voyage or trip on account of rottenness or unseaworthiness, then the said companies shall not be liable to make good any loss under this policy; and it is understood that no loss is to be paid arising from any neglect in not keeping the boat well pumped out except in case of accident; and it is also further provided that the said boat shall at all times during the continuance of this policy be tight and well found in anchors, cable, rigging, tackle, and apparel as is usual and customary; also in all other things and means necessary and proper for the safe navigation thereof according to the usage and custom; and that whenever said vessel shall lie at anchor in the night time she shall show one or more lights in a conspicuous place so as to warn and give notice to approaching vessels.

And, further, should any loss or damage under this policy be occasioned by any other vessel, person, or persons in such a manner that such other vessel or the owners thereof or such person or persons shall be liable therefor, then all claims for such loss or damage shall be assigned over to these companies and shall inure to their benefit in proportion to the amount of such loss sustained by them—
that is to say, the amount of such loss shall be satisfied and
25 paid out of what shall be recovered by such claims in the
same proportion (according to the amount) as the losses sustained by other sufferers shall be paid out of said recovery.

This policy may be assigned: Provided, that before any loss happens notice shall have been given to these companies of such assignment; otherwise the companies shall not be bound to pay any loss upon this policy: And provided further, that the said companies when so notified shall be at liberty to return a ratable proportion of the premium and thereupon be exonerated from their responsibility by virtue of this policy, and the same shall cease and be of no further effect.

Losses and averages to be adjusted and settled on each voyage separately, and all differences may be submitted to the judgment of arbitrators, indifferently chosen, whose awards shall be binding on the parties; and in case these companies require it they shall be so submitted. It is furthermore hereby expressly provided that no suit or action against said companies for the recovery of any claim upon, under, or by virtue of this policy shall be sustainable in any court of law or chancery unless such suit or action shall be commenced within the time of twelve months next after said loss or damage shall occur; and in case any such suit or action shall be commenced against said companies after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby attempted to be enforced.

In witness whereof the presidents of the Providence Washington Insurance Co. and Security Insurance Co. have hereunto subscribed their names and caused the same to be attested by their secretaries this — day of ——, A. D. 188–.

CHAS. PETERSON,
President Security Insurance Co.

H. MASON, *Secretary.*

J. H. DE WOLF,
President Providence Washington Insurance Co.

J. B. BRANCH, *Secretary.*

This policy will be void unless countersigned by their duly authorized agent at ——.

Countersigned by—

—— ——, *Agent.*

(Edition C.)

26 Libellants' counsel also offers in evidence the certificate of insurance, marked Ex. 2. Admitted.

LIBELLANTS' EXHIBIT NO. 2.

Providence Washington Ins. Co., Providence, R. I.

Security Ins. Co., New Haven, Conn.

New England Underwriters, inland marine department; Worthington & Sill, gen'l agents, Buffalo, N. Y.

Canal Cargo Certificate.

No. 668. $9,875.

This certifies that H. Morse & Co. insured under and subject to the conditions of policy No. 772, issued by the New England Underwriters, in the sum of ninety-eight hundred seventy-five dollars, in board cargo of boat Wm. Worden—

On wheat, $9,875, at and from Buffalo to New York, —— to ——.

Loss (if any) payable to assured or order and return of this certificate.

This certificate of insurance is not valid until countersigned by the authorized agents for this company at Buffalo, N. Y.

Buffalo, N. Y., May 17th, 1883.

WORTHINGTON & SILL,
General Agents.

Written across face in red ink:

Received, New York, June 26th, 1883, from New England Underwriters ninety-two hundred eleven $\frac{75}{100}$ dollars in full for all loss and damage under this certificate, which is hereby surrendered and annulled.

$9,211.75. ARMOUR PLANKINGTON.
WHITLOCK.

Endorsed: H. Morse & Co.

Libellants' counsel also offers in evidence a receipt, Ex. No. 3. Admitted.

27 LIBELLANTS' EXHIBIT No. 3.

(Organized 1779.)

Providence Washington Ins. Co., Providence, R. I.

(Organized 1841.)

Security Insurance Company, New Haven, Conn.

New England Underwriters inland marine department; Worthington & Sill, gen'l ag'ts.

BUFFALO, *June 30th*, 1883.

Received of Worthington & Sill, gen'l agents of the Providence Washington Ins. Co. of Providence, R. I., and the Security Ins. Co. of New Haven, Conn., comprising the New England Underwriters, five hundred and twenty (520) dollars in full payment of all claims for loss on our interest in the cargo of wheat of boat "Wm. Worden," sunk in the Hudson river on or about May 29th, 1883; and for and in consideration of such payment we, H. Morse & Co., hereby assign and transfer to these companies all claims and demands against the steamer "Sydney" or her owners arising from or connected with said loss of said cargo, and these companies are hereby subrogated in the place of and to said claims or demands of said H. Morse & Co. against said steamer "Sydney" or her owners to the extent of their interest insured by said companies.

H. MORSE & CO.

28 Libellants' counsel also offers in evidence the notice of abandonment, Ex. No. 4. Admitted.

LIBELLANTS' EXHIBIT NO. 4.

Agreement made and entered into this 26th day of June, 1883, between Armour, Plankinton & Co., of New York city, of the first part, and the Providence Washington Insurance Company of Providence, Rhode Island, and the Security Insurance Company of New Haven, Connecticut, of the second part, witnesseth:

Whereas on the 17th day of May, 1883, by one certain policy of insurance, the said parties of the second part became the assurers of the said party of the first part upon a cargo of wheat on board the boat "William Worden," whereof Charles E. Wager was master on her late voyage from Buffalo to New York; and whereas, detriment and loss having accrued to the said insured property by reason of some of the perils in the said policy mentioned and described, the said parties of the first part have ceded and abandoned to the said parties of the second part the said insured property and all their interest therein;

And whereas the said parties of the second part have accepted the said cession and abandonment and have therefore paid to the said parties of the first part the sum of nine thousand two hundred and eleven $\frac{75}{100}$ dollars in full satisfaction of the sum by the said policy insured:

Now, this agreement witnesseth that the said parties of the first part, in consideration of the sum paid as aforesaid, which payment is hereby acknowledged, have ceded and abandoned and set over unto the parties of the second part aforesaid and their assigns the aforesaid cargo of wheat and all the right, title, and interest of the parties of the first part thereunto; and the parties of the first part hereby release and discharge the parties of the second part and their successors from any claims and demands whatsoever by reason of the policy of insurance hereinabove mentioned.

29 And the said parties of the first part hereby constitute and appoint the said parties of the second part their attorneys irrevocable to sue for, recover, and receive the said cargo of wheat and all moneys thence arising and all damages of and concerning the same, either in the names of the said parties of the first part or in their own proper names, to wit, that of the party of the second part.

Witness the hands and seals of the parties of the first part the day and year first above written.

ARMOUR, PLANKINTON & CO. [L. S.]

In presence of—

U. C. WHITLOCK.

30 Counsel for claimant offers in evidence the application for insurance, marked Claimant's Ex. "B." Admitted.

CLAIMANT'S EXHIBIT B.

Worthington & Sill, general agents, New England Underwriters, canal insurance; office, No. 48 Main street and 10 Dayton street, Buffalo, N. Y.

(Copy.)

Insurance is wanted by H. Morse & Co.—loss, if any, is payable to do. or order—on wheat in board, cargo of boat "Wm. Worden," $9,875, from Buffalo to New York.

Rate — cts. is ---------------------- $

Total premium ---------------------- $

Buffalo, May 17, 1883.

H. MORSE & CO., *Applicant.*

31 Claimant's counsel also offers in evidence a draft, marked "Claimant's Ex. D," and a shipping bill, marked "Claimant's Ex. E." Admitted.

CLAIMANT'S EXHIBIT D.

H. Morse & Co.

$516.94. BUFFALO, N. Y., *May* 18, 1889.

Pay to the order of J. W. Bridgman, cashier, five hundred and sixteen $\frac{94}{100}$ dollars fifteen days after date; or if you shall sooner collect freight and charges on canal-boat "William Worden," then pay said sum immediately thereafter. A bill of lading of such boat is placed in your hands, bearing date May 17, 1883, for the express purpose of enabling you to meet this draft.

H. MORSE & CO.
J. FERO.

To E. B. Brooke & Co., New York.

Protest for non-acceptance only.

Printed across the face in red ink:

— accept this draft and agree to pay the amount named as therein directed at the —.

(Signed) E. B. BROOKE & CO.

(CLAIMANT'S EXHIBIT E.)

"No. — BUFFALO, *May* 18, 1883.

Shipped by H. Morse & Co., in apparent good order, on board the canal-boat 'William Worden,' of Syracuse, whereof Charles E. Wager is master, the following-described property, to be transported to place of destination without unnecessary delay, and to be delivered as addressed on the margin, in like good order, in the customary manner, free of lighterage, upon payment of freight and charges as prescribed in this bill.

Consignees to pay all harbor towing from and to the usual place of landing. Three week days, regardless of weather (including day of arrival, providing notice of arrival shall be given before four o'clock p. m.), after arrival and notice of same, to be allowed consignees to discharge this cargo, after which time the cargo or consignees are to pay demurrage at the rate of two and one-half per cent. per day upon the freight, including tolls, for each and every day of such demurrage over the three days, as above specified, until the cargo is fully discharged; and it is agreed between the carriers and shippers and assigns that, in consideration especially of the rate of freight hereon named, the said carriers, having supervised the weighing of said cargo in board, hereby agree that this bill of lading shall be conclusive as between shippers and assigns and carriers as to quantity of cargo received in board and to be delivered at port of destination, and that they will deliver the full quantity hereon named. All damage caused by the boat or carrier, or deficiency in the cargo from quantity as hereon specified, to be paid for by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee. In case grain becomes heated while in transit the carrier shall deliver his entire cargo and pay only for any deficiency caused by heating exceeding five bushels for each one thousand bushels.

The freight charges and demurrage to the amount of $— are payable by check to the order of —— ——, New York, such check to be delivered to —— —— for such bank, the balance payable to said —— ——, who is the only party authorized to collect the same, whose receipt shall be in full for all demands therefor.

32 *Ex. E.—Con.*

Tolls on this cargo having been advanced by H. Morse & Co., if refunded must be to them or to their order.

In witness whereof the said master of said boat hath affirmed to two bills of lading, one marked 'original' and one marked 'duplicate,' of this tenor and date, one of which being accomplished, the other to stand void.

7,900 bushels of wheat:

Freight to New York, per bushel, 5	$395 00
Captain's advance	319 44
On safe delivery E. B. Brooke & Co. collect as above and pay captain	75 56

Hold subject to our draft $319.44.

H. MORSE & CO.
FERO.

Care E. B. Brooke & Co., New York.
J. W. SCHLEHR,
Dep. Clerk.

3—224

Endorsed:

Insurance	$14 82
Commission	19 75
Trimming	9 87
Cash	34 74
H. Morse	240 26
	319 44"

33 Counsel for the respective parties read in evidence the testimony taken in the district court as the same was contained in the apostles, counsel for each party reading the testimony taken in their own behalf, including all the testimony of Meadows, Morse, and Sill, hereinafter set forth.

The court, on claimant's application, allows him to put in testimony on the question of negligence.

Counsel for the respective parties thereafter and on the 11th day of December, 1886, read in evidence the depositions taken on the question of negligence:

Here the testimony was closed.

The claimant and appellant duly excepted to the findings of fact and conclusions of law and the refusal to find facts and conclusions of law hereinafter referred to and set forth and for the reasons therein mentioned.

First.

In the third finding of fact:

The learned judge finds, among other facts, that "and at the same time entered into a contract with him (Meadows) for the transportation of the cargo to New York, evidenced by a bill of lading, in which they (H. Morse & Company) described themselves as carriers and Armour, Plankinton & Company as shippers;" to which the claimant duly excepted on the ground that there is no evidence upon which to base such a finding of fact. The only evidence upon which said finding is based is the bill of lading set forth in the third finding of fact and the following testimony of William Meadows and Henry Morse:

34 WILLIAM MEADOWS, being duly sworn and examined as a witness for the libellants, testifies:

(By Mr. McCARTHY:)

Q. You are the gentleman referred to in the bill of lading?

A. Yes, sir; the shipper.

Q. Where do you reside?

35 A. Buffalo. My occupation is commission merchant, mainly in handling grain, and that was my occupation in the month of May, 1883.

Q. (Handing witness Libellants' Exhibit No. 1.) Are you the gentleman referred to as the shipper in that bill of lading?

A. Yes, sir.

Q. Did you have this cargo of seventy-nine hundred bushels of wheat there?

A. Yes, sir; it was consigned or was about to be consigned to Armour, Plankinton & Company, of New York, who were the owners of the cargo in this case.

Q. Did you contract for the transportation and insurance of this cargo at Buffalo?

A. Yes, sir.

Q. With whom did you make that contract?

Objected to on the ground that it should appear whether the contract was in writing or not.

Q. Was the contract in writing?

A. No; verbal; the contract was a verbal contract.

Q. That is, it was made before the bill of lading was signed?

A. Before the bill of lading was signed; yes, sir.

Q. With whom did you make the contract?

A. Morse & Co., whose names are attached to the bill of lading.

Q. What was the transaction between yourself and Morse & Co.?

The COURT: In the first place, state what Morse & Co.'s business was.

The WITNESS: They are known there as agents of canal-boats, forwarders, and owners of canal-boats. Scalpers they are commonly known as.

(By Mr. MCCARTHY:)

Q. What transaction did you have with them—Morse & Co.?

A. Morse & Co.? I don't know. I can't recollect just now the
exact manner in which this particular boat-load of grain was
36 shipped, but the ordinary way would be I would either go to
Morse & Co., who had boats, or they would come to me, having the property to ship, and we would agree upon the rate of freight for carrying that load of wheat to New York. After that agreement was made Mr. Morse would go to my office and get an order for the load of wheat. At the time of getting the order my man, my book-keeper, who writes the order, will instruct him where to insure it.

Q. Is that a part of the contract?

A. That is a part of the whole contract. Morse & Co. go down and make their application for insurance, and when the boat is loaded or before it is loaded the certificate is sent up to my office, and when the bill of lading is signed, as far as my party is concerned, the contract is consummated. The bill of lading is signed by Morse & Co. and a copy is signed by myself.

Q. When the bill of lading is brought to you is any other paper brought?

A. The insurance certificate is either brought at that time or before. We usually require them before, so that we know that the boat is insured before she is loaded or by the time she is loaded.

Q. Would you accept the bill of lading without the certificate?

A. No, sir.

Q. And how is the premium paid?

A. The premium is paid by the carrier, Morse & Co.; they pay the insurance company.

Q. In what way?

A. The account is made against them. Their contract with me is to carry that cargo to New York as well as to insure it. The rate named there covers the insurance.

Q. That is $516.94?

A. I suppose that is the amount; maybe that includes the advance charges. (Examining the paper.) That $516 includes the advance charges.

37 Q. To the extent of the value of the cargo, who is insured in this case, then?

Objected to. Objection sustained.

(By the COURT:)

Q. Do I understand you that the rate agreed upon for transportation to New York includes the insurance premium?

A. Yes, sir.

Q. That rate includes the paying of the insurance?

A. Yes, sir.

Q. In saying that the rate covers the insurance do you mean to state to the court that the rate for transporting to New York agreed upon with Morse & Company includes the premiums to be paid upon the certificate?

A. That is a part of the contract, as we understand it; yes, sir; that they shall furnish the insurance, furnish the insurance certificate, and pay the premium upon it, but hand it over to me as insurance on the property.

(By Mr. MCCARTHY:)

Q. Would you give him the cargo if he didn't do it?

A. No, sir.

(By the COURT:)

Q. When the insurance certificate is handed to you is the indorsement like what is upon Exhibit 2 made upon it at that time?

A. Yes, sir; it is indorsed over to me in this way.

Q. That is done at the time?

A. Yes, sir.

Q. Not after the loss happens?

A. Oh, no.

Q. That indorsement is made at the time the certificate is delivered to you?

A. Yes, sir.

(By Mr. MCCARTHY:)

Q. You speak of custom or what would be done ordinarily. Wasn't that the state of facts in this case?

A. Yes, sir.

Q. Does this bill of lading and certificate of insurance go on to New York before the boat leaves Buffalo?

A. It did in this case. Before the boat leaves Buffalo? I
38 can't say as to that. It goes promptly at once where the property is owned in New York.

Q. Both are sent to the owners?

A. To the owners of the grain or as directed.

(By the Court:)

Q. The rate of transportation is paid by the owners?

A. On the delivery of the cargo in New York, less the advance; there are advance charges they usually pay me, charges that accumulate before it arrives in Buffalo, but that has no bearing on this case at all.

Cross-examined by Mr. Hyland:

Q. How long have you been in this business?

A. Since 1872.

Q. You have shipped a great many cargoes of grain to New York?

A. I have; yes, sir.

Q. And a great many of those cargoes have been damaged during that time?

A. I have a fair number of losses; yes, sir.

Q. Have you known a single instance during your time where the insurance company, after paying the loss on your cargoes, have demanded of the captain of the boat or brought a claim against the boat itself for the moneys they have paid out for losses on cargo?

Objected to.

The Court: I think I ought to admit that question in connection with what is claimed in the answer as being the design of the insurance—that it is for the benefit of the carrier.

Exception.

A. I don't think I know of any case of the kind.

Q. When you made this agreement with H. Morse & Co.
39 did you make that agreement with them as principals or as agent of the captain of the boat?

Objected to as a question of law.

Q. Did they represent themselves to be principals or agents when they took this cargo to transport?

Objected to as incompetent, and also as to form.

The Court: The witness has already said that he does not remember about this transaction. You can prove by him anything he knows in regard to the relation of Morse & Co. to the boats or to the captain of this boat.

The Witness: Doesn't the bill of lading prove?

Mr. HYLAND: We stand on that, that they are the principals and carriers as far as that is concerned.

Q. When does the captain of the boat sign this bill of lading? Do you know that he signed that?

Objected to.

A. That is supposed to be the captain's name.

Q. Do you know that the captain signed this bill of lading also?

Objected to as immaterial; that after the admission that Morse & Co. are the principals in the contract the captain isn't of any consequence one way or the other.

The COURT: It is plain that we must know what was the relation which Morse & Co. sustained to the boat.

40 Q. Was it signed in your office or not?

A. It was not in my office.

Q. Was it signed when you signed it or not, and when Mr. Morse signed it?

A. That is supposed to be the captain's signature there. That is signed, I suppose, as much for Mr. Morse's protection as ours. We usually ask that the captain sign a bill of lading as well as Morse, although we look to Morse as the carrier. We ask it for additional security.

Q. Isn't it a custom in your business that you will not allow any cargoes to be taken on canal-boats until they are insured by the carriers so as to protect—to give the owners a collateral security?

Objected to as leading.

The COURT: Isn't that just what he said—that they will not take the bill of lading until they get the insurance, and that the rate paid includes the insurance?

Q. Then the cargo is not insured in the name of the owners at all?

Mr. McCARTHY: That appears here.

A. The certificate there shows how it is insured.

Q. Does it show in whose name it is insured?

A. We suppose that that transfer transfers it to the owners.

Q. But your instruction is to the carrier to go and get it insured?

A. Yes, sir; that is the instruction.

Q. Do you know why you don't go and get it insured yourself?

A. I only know that that has been the custom and the way the business has been done since I have been in Buffalo and in this business. It has been done in this way: We direct the in-
41 surance, as a rule, but it comes out that the carrier pays it in this way: It is included in the bulk charge—the bulk sum—and the account is kept between the insurance company and Mr. Morse, as far as that is concerned. That is the way the business has been done. How it originated in that way I can't say. That is

the way I found it and the way it has been done since I have been there.

Q. Do you know anything about the arrangement between Morse & Co. and the captain of the canal-boat?

A. Of that particular boat?

Q. Yes, or of any other—that is, the customary arrangement between the captain of the boat and Mr. Morse when grain is carried in this manner.

A. I have a general idea how it is done.

Q. How is it done?

Objected to as immaterial how it is generally done; that it is this particular case that should be inquired about.

The COURT: If he knows in regard to the customary way in doing such business he may tell.

Exception.

(By the COURT:)

Q. Have you any knowledge whatever in regard to any interest of the owners or captains of the boat in the insurance?

A. In the insurance?

Q. Or as respects the payment of the premiums of insurance?

A. Nothing, only what I have stated. I will say this: The captain is supposed to have his freight-list insured in this particular policy—that is, his advances, what has been advanced to him, and the freight-list, as it is called, on the lakes or ocean to the amount, probably, of five hundred odd dollars, and he would claim that. They usually take out a separate policy for that claim,
42 but in this case it must be all included in the one policy—a separate certificate, I mean—which the carrier holds.

Q. You have spoken of "advances" and "freight-list." They are not the same, are they?

A. In this case it is all merged in one certificate.

Q. But they are different things?

A. Yes, sir; they are, but they are included in the one certificate.

Q. What advances do the captains pay?

A. They advance the captain, as I understand it, about all the freight before it is earned.

Q. You mean the advance of freight? That is all you mean?

A. Yes, sir; and there are also what we call back charges—that is, the expense of bringing it down from the West.

Q. The captain doesn't pay that?

A. Yes, sir; we ask them to pay the back charges, as we call them.

Q. Doesn't Morse & Company pay those?

A. Yes, sir.

Q. I am speaking of the captain.

A. It is all the same. Morse & Company pay it as the agent of the captain, I suppose.

By Mr. McCarthy:

Q. You don't know, do you?

A. No; I don't know in this case what Mr. Morse did on this boat, but I am speaking of the general way of doing business there.

By Mr. Hyland:

Q. You do speak of Morse & Company as being the agent of the captain?

A. I don't know in this case whether they were the agents of the boat or not. I have no means of knowing.

Q. How do you account for the fact that H. Morse & Company issue an open policy for the whole season if you say it is customary for your clerk to notify Mr. Morse where to insure the cargo when he comes in?

43 A. Morse & Company don't issue any policy, as I understand it, do they?

Q. Morse & Company don't have an open policy issued for the season?

A. Issued to them?

Q. To them; yes.

A. I don't know whether this policy is issued to Morse & Company under which that is insured or issued to me directly. I really don't know about that. I have never looked into that question. I know I got the certificate of insurance, and further than that I have never known who had the general policy or whether there is any general policy issued or not. I only know that I demanded that certificate of insurance at the time this contract was made and I got it. Further than that I don't know. The insurance company will probably tell you how that is.

(By the Court:)

Q. I understood you in your direct examination to testify as though you or your book-keeper had the selection of the companies from whom insurances should be got.

A. Yes; we do, as a rule, direct to insure in certain companies.

Q. How, then, could a certificate of this kind be obtained under a standing open insurance policy?

A. That is the point I just answered. I am a little obscure about it. I do not know whether that policy is issued to Morse & Company under which that certificate is issued or to whom it is issued or whether there is one issued at all or not. I really don't know that.

Q. You testified as though your clerk had a choice and could designate what company he pleased.

A. That is the custom of doing the business. The party owning the property has the direction of the insurance. He directs Mr. Morse to place it in certain companies and it is done, as a rule.

(By Mr. Hyland:)

Q. Is there any other bill of lading that you signed aside
44 from this one that has been shown you?

A. That is marked "original" across the face, is it not? Then there is a copy or duplicate. I signed a copy of that.

Q. And those are the only ones that you sign, the only ones you issue at the office are one set, known as the original, and then you make one copy?

A. You will see that I have not signed that one.

Q. You have one that you have signed?

A. No; I haven't any that I signed.

Q. This shipping bill doesn't speak of you as agent. Do you ship in your own name and not as agent?

A. Sometimes I ship in my own name. I am agent in that case.

Q. The shipping bill does not so state. How do you explain that?

A. I can't explain it, but I was agent all the same.

Q. As matter of fact did H. Morse & Company know who owned that cargo when it was shipped, except that you were the shipper?

A. They could tell by the bill of lading.

Q. That is the only way they could tell?

A. Yes, sir.

Q. They could tell who the consignees were, but they couldn't tell who the owners were?

A. Not very well, not who the actual owners were.

Mr. Hyland: I submit counsel has not shown anything further than the papers show. He does not show any insurance.

Mr. McCarthy: I rest the case. I am quite willing to leave it on the testimony of Mr. Meadows that Armour, Plankinton & Co. were the persons insured.

Mr. Hyland: I claim that the court has a right in such a case as this to give me a decision now.

The Court: There is nothing gained by dismissing a case on merely formal grounds. If the insurance company is enti-
45 tled to recover at all the facts pertaining to it had better be set forth here, unless there is some good reason why it should not be.

Mr. Hyland: I think I shall submit the case.

It is agreed that policy No. 772 is like the open policy in form, and the open policy is offered in evidence.

Mr. McCarthy: I will admit that no persons' names were endorsed on the back.

The policy is marked "Claimant's Exhibit A."

New York, *January* 7, 1885.

Mr. McCarthy: I offer in evidence the abandonment.

Mr. Hyland: This purports to be an abandonment of Armour, Plankinton & Co. to the libellants, but I object to the introduction of the document until they have shown that Armour, Plankinton & Co. were insured.

The paper is admitted and marked Libellants' Exhibit No. 4.

46 WILLIAM MEADOWS recalled.

(By the COURT:)

Q. How long have you known this kind of business to be done in Buffalo by these middle men?

A. I have been engaged in the business in Buffalo for eleven or twelve years, and I was, more or less, connected with the same business in Chicago five or six more--twelve or eighteen years, probably.

Q. What do you say in reference to the business done by this class of persons, as to whether the goods they handle are usually owned by them or not? I refer to the "scalpers," as they call them.

A. As a rule, they do not own them.

Q. Do you know what the usual practice is in regard to the signature to the bill of lading—whether it is the same as in this case or different—that is to say, whether the scalpers, as you call them, signed the bill of lading or not?

A. It is usually signed as in this case. That is my experience.

Q. And in regard to procuring a certificate of insurance to accompany the bill of lading, is that customary or usual?

A. It is univers, I believe.

Q. Then you mean to say that the course pursued here, such as has been testified to by you in regard to this particular instance, was the same as the usual practice?

A. Yes, sir.

Q. How long had that been in practice—just this mode in Buffalo?

A. Since I have been in the trade there—twelve years, at any rate, and how much longer I do not know.

(By Mr. MCCARTHY:)

Q. You have always understood, haven't you, that your parties, the owners of the cargo, were insured by means of this transaction?

A. I have always understood so.

Q. Have you ever known or believed or supposed that the insurance company after paying you had lost their right of subrogation; that they ever intended to do anything by which they should lose their right of subrogation?

Objected to.

47 A. To confess the truth of it, I have never given the matter any consideration. I have never had a case of this kind.

(By the COURT:)

Q. Have you ever considered at all in what form the insurance effected in the way you have mentioned was to be made available as distinguished from the fact that it was to became available to the consignees?

A. I suppose the insurance was available only to the owners of the property. I never looked upon it in any other way.

(By Mr. McCARTHY :)

Q. Did you contract with Morse & Co. to give them the benefit of that insurance or the boat the benefit?

A. No, sir.

Q. Did you intend to do so?

A. No, sir.

Cross-examined by Mr. HYLAND :

Q. Don't you regard your position as agent for the vessels, the lake vessels coming in there, in regard to the owners of the cargoes of wheat and grain, about the same relatively as H. Morse & Co., representing the boats that come there; you represent owners of the grain, do you not?

A. Yes, sir.

Q. And didn't you regard H. Morse & Co. and all these scalpers as representing the boats?

A. Do you ask me if I regard them in the same light as agents of the vessels?

Q. Don't you regard yourself as representing the owners of the cargo and the scalpers as representing the boats?

A. Yes, sir.

HENRY MORSE, being duly sworn and examined as a witness for the claimant, testifies:

(By Mr. HYLAND :)

Q. Where do you reside?

A. In Buffalo.

48 Q. How long have you resided there?

A. About thirty years.

Q. Are you one of the members of the firm of H. Morse & Company?

A. I am.

Q. You are the senior member?

A. Yes, sir.

Q. And the company is composed of yourself and who else?

A. My brother.

Q. How long have you been doing business under the name of H. Morse & Company in Buffalo?

A. I should think about twenty-four or twenty-five years.

Q. During that time have you been constantly engaged in the business in which you are now engaged?

A. I have.

Q. Will you state to the court what that business is—the whole nature of that business?

A. It is loading canal-boats, taking freight, and loading boats on commission.

The Court: State in detail just how the business is transacted, just what you do.

Q. When a boat comes to Buffalo and reports to you what do you do?
A. We get a load of freight.
Q. How do you do that?
A. By going to the grain-receivers or grain-owners and procuring the freight.
Q. And when you procure the cargo what do you do?
A. We go to the captain of the boat, arrange with him to put on the load, insure the boat, and charge it up to the captain.
Q. Do you insure the cargo?
A. The cargo; yes, sir.
Q. State how you insure the cargo, the manner of doing that.
A. We make out an application and take it to the company, and they put it on our book which contains the policy. We take it to the company, and they enter it upon our book and give us a certificate.

49 By the Court: The company enter it in your book?
A. Yes, sir.

(By Mr. Hyland:)

Q. And what do you do with the certificates?
A. When we clear the boat we get the captain's bill of lading, which we sign, too, pin it to that bill of lading, and carry it to the party who gives us this cargo to carry.
Q. What do you do that for?

Objected to. Question withdrawn.

Q. Whom do you insure and in what capacity do you insure when you get out the policy or certificate?

Objected to as a question of law.

The Court: I will allow you to prove the usual course of business, what they do in the usual course of business, and what they did also in this particular instance.

Q. Who pays the premium for this insurance?
A. The captain of the boat.
Q. When you procure this insurance for whom do you act?
A. For the captain.
Q. Of the boat?
A. Yes, sir.
Q. Who pays you?
A. The captain pays us a commission.

(By the Court:)

Q. How is that commission regulated?
A. The customary price is five per cent. of the amount of the

freight. Should the freight amount to four hundred dollars it would be twenty dollars; three hundred dollars, it would be fifteen.

Q. What is that computed upon—the freight from Buffalo to New York?

A. From Buffalo to New York; yes, sir.

50 Q. How in regard to the prior charges?

A. That we have to pay, when there are charges, but we get no more for that.

Q. By paying you mean you advance it only, I presume.

A. We advance it; yes, sir.

(By Mr. HYLAND:)

Q. Had you a book account with the captain of the "Worden" in this case at the time this cargo was shipped?

A. I had.

(By the COURT:)

Q. How are you reimbursed for the prior charges that you advance, if you do so?

A. By this commission that we charge—five per cent. on the amount of the freight. How do we get back the money? We make a bill of lading and make a draft on our agent in New York, and we put in this charge of the insurance and our commission and advances.

(By Mr. HYLAND:)

Q. And where is it collected by your agent?

A. In New York.

Q. When the cargo is delivered?

A. When the cargo is delivered.

(By the COURT:)

Q. You say it is collected when the cargo is delivered. How is it collected?

A. Collected by our agent from the consignee or owner of the grain.

Q. Does the captain indorse your draft?

A. He does not.

Q. Why doesn't the captain collect the whole amount himself?

A. Because he has had such a portion of the freight in Buffalo. We have to advance the money to run down with.

Q. What voucher is there to the consignee to know how much to take out for the captain?

A. The bill of lading.

(By Mr. HYLAND:)

Q. (Handing witness a paper.) What paper is that?

A. That is a draft made.

Q. On this cargo?

A. I think it is; yes, sir.

51 Claimant's counsel offers the draft in evidence, and it is marked "Claimant's Exhibit D."

(By the Court:)

Q. How is it that the captain doesn't collect the whole; how do you prevent the captain from collecting the whole amount?

A. By consigning him to an agent here. He goes to the agent; that agent collects the money from the——

Q. Consigning whom, do you mean?

A. The captain. We give him a bill of lading, say, to an agent here; on that agent we make another bill of lading, putting in the amount of the advance, and add a draft for that amount of advances that the captain has in Buffalo.

(By Mr. Hyland:)

Q. (Handing witness a paper.) See what that indorsement is on the back.

A. This is a bill of lading of the boat "Sydney."

Mr. Hyland: That is not the one I wish.

Q. (Handing witness another paper.) What is that?

A. This is the bill of lading of the boat "Worden."

Q. That was issued and delivered at the time this cargo was shipped and is for this cargo which was lost?

A. Yes, sir.

Q. Look at the endorsement on the back of the bill of lading and see whether or not that was made before the bill of lading was given to the captain.

A. That was put on before it was given to the captain.

The paper is offered in evidence and is marked Claimant's Exhibit E.

(By the Court:)

Q. Exhibit D is such a draft made upon your agents here?

A. Yes, sir.

52 Q. And is for this sum of $516, and that represented your advances and commissions and insurance premium in this case; in other words, it was what you were to be entitled to out of the earnings of this freight?

A. On the back of the bill of lading it is made up, copied from our book.

(By Mr. Hyland:)

Q. How many does the captain sign of those bills of lading?

A. He signs one for the owner of the grain. I think he signs one only for us—one or two; I will not be certain which.

(By the Court:)

Q. This is a different paper altogether from what is given to the shipper—Exhibit E?

A. Somewhat different.

Q. It isn't a copy. It is an independent paper that you have made out yourselves?

A. Yes, sir.

Q. And what was there in this case as between you and the captain that consigned the captain, as you say, to E. B. Brooke & Company? There is no no signature of the captain here. What signature of the captain have you got?

A. We have that on our boat book, which is at home. He signs the book we have at home.

Q. He signs the boat book?

A. Yes, sir.

Q. You don't send the boat book to your agent here?

A. We do not?

(By Mr. Hyland:)

Q. What do you send with this draft to the agent here?

A. A bill of lading.

Q. Is it like this one?

A. It is similar to that.

(By the Court:)

Q. Do you mean to say you send a copy of that same bill of lading that you give the shipper to anybody else?

A. We send not a regular copy of that, but something similar to it.

Q. I am speaking of that paper—either a duplicate or a copy.

A. Yes, sir.

Q. Do you send a duplicate or a copy?

A. Yes, sir; to our agent; through the bank.

Q. Signed by the master?

A. Signed by the master.

53 Q. Something different from this (Exhibit E)?

A. Something different.

Q. You haven't got that with you?

A. I don't think I have. I presume Mr. Brooke has got it in his office.

The Court: This paper (Exhibit E) would have no effect on the boat or captain?

Mr. Hyland: The draft that goes with that to Mr. Brooke is an order to collect the draft.

(By Mr. Hyland:)

Q. Who collects the freight down here?

A. Our agent, Mr. Brooke.

(By the Court:)

Q. Why doesn't the captain get it if he wants it? What is there to prevent his getting it?

A. The bill of lading we give to Mr. Meadows. The advance is made up and put on that bill of lading, and on that bill of lading it is ordered to be paid to our agent, Mr. Brooke & Co.

Q. This is the part that you refer to, in this corner (referring to the paper)?

A. Yes, sir.

(By Mr. HYLAND:)

Q. (Handing witness a book.) What book is that you have in your hand?

A. This is our day book where we enter up our boats.

Q. What account is that (on p. 116)?

A. That is the account of the boat "William Worden" on that day, May 18th, and the advances to said boat on that day as made up, the insurance, commission money advanced and owing, if any, and so forth. The expenses, charges, and freight for my bill of $516.94 consist of the following items: To Worthington & Sill, insurance, $14.82; commission, $19.75; Alanson Morse, cash, $240.26; cash, $34.74; William Meadows, $200.

(By the COURT:)

Q. Your commission was five per cent.?

A. Yes, sir.

Q. And the captain's charges were five per cent.?

A. Five cents a bushel, and it amounted to $395, making our commission $19.75.

54 (By Mr. HYLAND:)

Q. How long has this system or plan of shipping been practiced in Buffalo?

A. Ever since I have been in Buffalo—thirty years.

Q. During that time have there been many losses by sinking of cargoes in your business?

A. Well, quite a good many.

Q. Were they all insured in the same manner in which this cargo was insured?

A. They were.

Q. Were the certificates of insurance sent out in the same way that this was?

A. The same way.

Mr. McCARTHY: I don't see how it is possible for this witness to give such testimony.

(By the COURT:)

Q. You are speaking of your own business?

A. I am speaking of my own business.

By Mr. HYLAND: During that time has any suit or claim ever been brought against the captain of the boat or yourself for loss of cargo by subrogation to the owners of the cargo?

A. Never has.

Q. Not a single instance?

A. No, sir.

Q. Do you know how other scalpers in Buffalo do their business?

A. Well, about the same way that I do.

Q. Do you know that?

A. I do.

Q. Do you know whether this is the customary way for all scalpers to do their business in Buffalo in this trade?

A. It is.

Q. And has it been since you have been there?

A. It has.

Q. Have you known of a single instance where a suit has been brought in any case, whether in your business or theirs or any one of theirs, against the captain of the boat or the scalpers by the insurance company under subrogation to the owner's interests in the cargo?

A. I do not.

Q. Is it understood and known, and has it been for twenty or thirty years, that in every instance the captain of the boat and the carrier are insured in this manner?

55 Objected to on the ground that the question as to who is insured is one of law, and that it is a matter of contract in this case who is insured. Objection sustained.

Q. Is there any understanding between you and the agent of the company with reference to who is insured and with reference to the meaning of the clause "for whom it may concern?"

Objected to on the ground that that is a question of fact of absolute contract and not of understanding at all.

The Court: So far as asking for his understanding, I will have to exclude that, but he may state any conversations, if there were any, with the insurance companies on the applications on taking out either the original policy or certificates.

Q. What conversations have you had, if any, with the agent or officers of the insurance company when this open policy was taken out by you in connection with applications for insurance?

Objected to on the ground that the only foundation for any claim on behalf of the captain must be a contract made by this gentleman with the owner of the cargo; that any conversation with the insurance company is of no consequence unless that conversation itself was an insurance.

The Court: I will admit testimony that bears on the same class of dealings. I will allow him to give conversations, if there are any, between him and the company or those who represent the 56 company in respect to such applications, either for the original policy—the open policy, as it is termed—or in obtaining the certificates.

Q. With reference to who was insured, I mean.

A. At the time this policy was taken out I don't recollect of having any conversations with the agent, but I have had conversations with the agent, Messrs. Worthington & Sill, and they understood it——

Mr. McCarthy: State what was said.

Q. In substance what was said between you with reference to the subject.
A. I cannot call to mind particularly.

(By the Court:)

Q. Have you ever had any conversations with the insurance people with reference to this class of insurance as to the persons covered or intended to be secured by it?
A. I have.
Q. In connection with taking out policies, I mean.
A. Yes, sir; and it was understood that the captain of the boat was insured.

Mr. McCarthy: I must object to this answer.

(By Mr. Hyland:)

Q. Was it stated in substance to that effect?
A. It was stated in substance to that effect.

(By Mr. McCarthy:)

Q. Stated what?
A. That the captain of the boat was insured.

(By Mr. Hyland:)

Q. Did you or did you not state the capacity to the insurance companies' agent in which you acted during some of these times of conversation?

Objected to as leading.

A. I think I did.

Mr. McCarthy: That is not evidence.

57 Q. Have any of these certificates been returned to you in any of the transactions that you have had for collecting losses which had been paid by the captain?
A. There has.
Q. How often has that occurred in your business?
A. It may have been two or three times a year, and may have been less some years.
Q. And have you collected from the insurance company the losses back under the certificate for the captain?
A. We have.
Q. Has there been any dispute with reference to your right of collecting? Have they always paid at once?
A. I don't recollect of there having been any dispute ever.

Q. Is it demanded of you that you get this cargo insured before you take it?
A. It is.
Q. Do you know why they required that?

Objected to on the ground that it would be a mere surmise on the part of the witness. Question withdrawn.

Q. Do they require of you other securities than simply the shipping bill of the captain of the vessel that their cargo will be carried through safely or that they will have some one to pay for it in case it is not?

Objected to as a mere argument and as incompetent.

The COURT: There are but two points in this case that are important. The first is as to the specific arrangement made at the time of this shipment, and the other is the regular course of business.

Q. Do you know who the owner of the cargo is at the time these certificates are issued?
A. We do not.
58 Q. You don't know anything about that?
A. We do not.
Q. And you didn't know who was the owner in this case?
A. We did not.

Cross-examination by McCARTHY:

Q. The bill of lading showed to whom the cargo was consigned, didn't it?
A. It did; when we got the bill of lading from Mr. Meadows we then understood it was consigned to Armour, Plankinton & Company, but we didn't know who owned the grain.
Q. You did know when you got the bill of lading?
A. We did not.
Q. You knew who the consignees were?
A. We knew who the consignees were.
Q. I suppose the very reason why you got this policy originally on account of whom it may concern was because you did not necessarily or would not know the names of the owners?
A. That is so in a certain degree.
Q. You are one of the bondsmen in this suit, are you not?
A. I am.
Q. And you are interested, are you not, to a considerable extent?
A. I am not to any great extent. I am on a bond. If you will allow me to explain——
Q. I will ask you some more questions: One of the boats proceeded against in this libel is the "William Worden"?
A. Yes, sir.
Q. At the time when she was proceeded against, a year ago last June, you were not the nominal owner?
A. We were not the nominal owner.

Q. A man named Wager was the nominal owner?

A. He was.

Q. But did you not have a mortgage on the boat?

A. My brother had.

Q. Morse & Company or only your brother?

A. My brother.

59 Q. And that mortgage was at that time overdue, wasn't it?

A. I presume likely it was, but I do not know for a certainty.

Q. And what was the extent of that mortgage?

A. I should think the extent of that mortgage was then some $800.

Q. And after the boat "William Worden" was damaged by coming on these rocks you or your brother got her repaired?

A. No, sir; the insurance companies that had the insurance on the boat got her repaired.

Q. What company was that?

A. That was the Buffalo Insurance Company.

Q. And what was the extent of those repairs?

A. Between nine and ten hundred dollars, I think.

Q. So the interest of your brother in the boat was to the extent of this mortgage of eight hundred dollars?

A. It was.

Q. It was a purchase-money mortgage?

A. I believe it was; I won't be certain; I hardly think it was.

Q. Do you know whether or not that mortgage has been paid?

A. It has been reduced down to four or five hundred dollars, I think.

Q. And you became a bondsman for the "Worden," didn't you?

A. Yes, sir.

Q. Did you, as well as your brother, sign the bond?

A. I did.

Q. Speaking from the general course of your business, do you admit or do you deny that Morse & Company, in this transaction, were common carriers?

A. We consider ourselves common carriers, together with the captain.

Q. But the captain is a person who intervenes only on your personal contract, isn't he?

The COURT: I think it would be better for you to get the facts.

Q. Mr. Meadows, the shipper, was never brought in contact with the captain at all, was he?

A. He was not.

60 Q. Never saw him?

—. No, sir.

Q. You applied to Mr. Meadows for the job, if I may use that inelegant term, and you applied for a load to take to New York, or he applied to you for a boat?

A. One or the other.

Q. After your arrangements have been made with Meadows you simply get a boat, and did in this case?

A. Yes, sir.

(By the COURT:)

Q. You take the job from Meadows not knowing what boat you will get?

A. We had the boat ready to load and took the load for this boat.

Q. In this case you did?

A. Yes, sir.

(By Mr. McCARTHY:)

Q. What particular reference did you have to the Sydney—any?

A. In regard to this load, none.

Q. You undertook and agreed with Mr. Meadows, then, to find transportation for his grain and to get it insured?

A. Yes, sir.

Q. Do you know whether Mr. Meadows made that special request of you or not?

A. I think very likely, as he always or generally does, he asked me to insure it with Worthington & Sill.

Q. You were to be paid—I suppose the agreement with Meadows was—a certain sum for taking the cargo to New York and getting it insured?

A. Yes, sir.

Q. And in this particular case the sum was $516.94, wasn't it?

A. It was five cents a bushel. No, sir; it would not be so much as that; five cents a bushel would be $395.

Q. Did five cents a bushel cover the cost of transportation as well as the cost of insurance?

A. It is always customary that the man taking the freight gets it insured.

(By Mr. HYLAND:)

Q. Taking the freight or cargo?

A. The cargo.

61 (By Mr. McCARTHY:)

Q. You say that $395 stands for five cents a bushel? That is the cost of transportation, is it?

A. Yes, sir.

Q. But, in addition to that, you undertook to insure, and that in this particular case was fourteen dollars and some odd cents more, and that had to be added. It was more, wasn't it?

A. No, sir; it was not more. That was included in the $395, the insurance that the captain paid.

Q. The five cents a bushel was for transportation and insurance premium?

A. Yes, sir.

Q. And was intended to cover both?

A. Yes, sir.

The COURT: How does it show in the day book?

Mr. HYLAND: $14.82; that is in addition to the $395.

The WITNESS: No; it is not; it is out of the $395.

The COURT (examining the day book): The book shows the gross amount of the freight $395, and then it shows certain charges, and the shipping bill sent to Morse shows the same aggregate charge deducted—that is, the insurance is deducted from the freight, which is the five cents a bushel.

Q. In other words, it comes to this, that for the $395 or five cents per bushel you are to get the cargo transported to New York and to get it insured?

A. Yes, sir.

Q. The cargo is the foundation of the contract?

A. Yes, sir.

Q. Then, in addition to that, the $200 freight charges that you have advanced on the part of the cargo or are about to advance is put in the bill of lading?

A. Yes, sir.

Q. Making in all $516.94?

A. Yes, sir.

Q. And this becomes a lien on the cargo?

A. Yes, sir.

62 Q. After that transaction was effected you paid over to Worthington & Sill fourteen dollars and some cents as premium?

A. Yes, sir.

Q. At the time you made this bargain with Mr. Meadows was there anything said about yourself or any other person having the benefit of that insurance?

A. Not anything.

Q. If it be true that either yourself or anybody else got any benefit out of that contract with Meadows it must be a benefit that arises from custom in the port of Buffalo, must it not?

A. Well, we don't understand it so.

Q. Did you communicate in that instance to the captain of the "Worden" that you had made any contract with Meadows for his, the captain's, benefit?

A. I don't think that I did.

Q. When you went to Worthington & Sill, which was the same day, wasn't it?

A. Yes, sir.

Q. And got this certificate—you were doing it pursuant to the contract that you had just made with Meadows?

A. Yes, sir; and to protect ourselves and the captain.

Q. Do you say you did or did not?

A. We did.

Q. Immediately after you got the certificate from the insurance company you pinned it to the bill of lading and took it back to Meadows?

A. Not immediately after—not until the boat was loaded and the advances made up and the boat cleared.

Q. Within a reasonable time?

A. Within a reasonable time.

Q. As soon as the figures had been ascertained?

A. Yes, sir.

Q. You did that pursuant to the contract that you had made with Meadows, did you not?

A. Yes, sir.

Q. When the loss occurred and the money had been paid over to Meadows or Meadows' principals do you pretend that you had any right to that money?

A. So far as our interest was concerned.

63 Q. Your interest as advancer?

A. Yes, sir.

Q. But any other right?

A. Not any.

Q. Your interest as advancer amounted to $520?

A. Yes.

Q. And you don't pretend that yourself—your firm—had any right whatever to the residue of the money that was paid to Armour, Plankinton & Company?

A. We did not. We did not own the property.

Q. Do you say that the captain of the boat had any right to that sum of seven or eight thousand dollars that was paid to Armour, Plankinton & Company?

A. I don't think he did.

Q. There was no contract between you and Armour, Plankinton & Company or between you and Meadows that gave him the right to that money or to any part of it, was there?

A. No, sir.

Q. Suppose there had been no insurance at all, was there anything in the transaction between yourselves and Meadows that would have prevented Armour, Plankinton & Company from pursuing these boats to recover for the loss?

A. I should think not.

Q. Was there anything in the contract between you and Meadows, that you know of, that cut off the insurance company's right of subrogation that they would have had upon paying Armour, Plankinton & Company?

A. With Meadows & Company I cannot say that there was.

Q. Now, will you be kind enough to tell me in what sense either yourself or the owner of that boat got the benefit of that insurance?

A. With the understanding and the custom——

Mr. McCarthy: I don't care about the understanding.

The Court: You must let the witness finish his answer to that question.

64 A. (Continued.) With the understanding with the insur-

ance company that ourselves, as common carriers, and the captain are protected when we take a policy from them.

Q. Protected in what way?

A. From any loss.

Q. Protected against whom?

A. Protected against any loss that may occur while a cargo is in transit, after being insured, from Buffalo to New York or to any other port.

Q. How can that be true, if, as you say, Armour, Plankinton & Company would have had the right to bring suit in case they had not been insured?

A. They were insured.

Q. But in case they had not been?

A. I do not know. I cannot say whether they really would have a right or not. I am not a lawyer and hardly supposed to know.

Q. Suppose a loss had occurred on the way to New York through the negligence of the boatman—through his gross negligence—would there have been such a protection?

A. I cannot say that there would.

Q. In other words, then, custom, understanding, or whatever else it may be, in Buffalo, does not protect the boatman from his own gross negligence—from the consequence of his gross negligence?

A. I don't know that it does.

Q. Or from his negligence?

A. I don't know that it will.

Q. You don't say that it would?

A. I don't.

Q. You can't say it would?

A. I can't.

Q. You can't say there is such a custom?

The COURT: Mr. McCarthy, I must protest against your asking the witness what his judgment is.

Q. (Handing witness Exhibit No. 3.) Please read that receipt. That is your receipt?

A. Yes, sir.

Q. Why did you say in this receipt that you transferred to the insurance companies all your claims and demands against
65 the steamer "Sydney" or her owners arising from or connected with said loss of cargo—why didn't you include the "Worden" also?

A. Well, that was handed to me on the payment of this amount of money. I didn't look at it particularly; supposed it was all right. I do not know that it is not all right now that I should have given such a receipt.

Q. I am not assuming at all that it was wrong in you to give it, but what I want to know is why you apparently assigned all your claim against the "Sydney?" Why didn't you also include the "Worden?"

A. It is because, probably—simply because they didn't ask it.

Q. But it is your receipt?

A. Yes, sir. As it appears, they didn't put in the "Worden."

Q. Did you at that time draw any distinction between the presumable liability of the "Sydney" and the "Worden" because the "Sydney" was the towing boat?

A. I don't think it was spoken of at the time. It was not, to my recollection.

Q. Do you remember whether that was in your thought or your intention?

A. I do not.

Q. You don't remember?

A. No, sir.

Q. You can't now say?

A. I cannot.

Q. Are you now drawing or willing to draw any distinction, after having read this receipt, between any presumed liability of the boat "Sydney" and the boat "Worden?"

Question not allowed.

Q. The captain paid no money in Buffalo to you, did he?

A. I think he paid some on the mortgage that he paid my brother.

Q. On this shipment, when you got the boat of the captain and put the cargo aboard, he paid you no money then?

A. No, sir.

Q. You are the firm—the ones who paid out all the money?

A. Yes, sir.

66 Q. And you advanced to the captain a sufficiency to pay his tolls and towing on the way to New York?

A. Yes, sir.

Q. And all those sums are included in this $516.94?

A. Yes, sir.

Q. You do not mean, then, when you say the captain paid the premium that the money actually came from the captain's hands to yours?

A. Not from the captain's hands to ours.

Q. You mean just as it appears here?

A. Just as it appears on the bill.

Q. In this particular case do you know who owned the "Sydney," who actually owned her?

A. Captain Wager owned the boat, but another party had a claim on the boat for about all she was worth, I think. That man is now dead. His name was Gillispie.

Q. You had no bargain with Captain Wager one way or the other about the matter, did you, as to whether he would employ mules or get a steam-tug or how he would get to New York with the "Worden?"

A. We did understand that he was going to tow the "Worden" with this steamboat "Sydney."

Q. Was that expressly agreed upon, or don't you remember?

A. While it was not agreed upon, it was understood by all that

that was to be the case—that he was towing the "Worden" with the "Sydney."

Q. Are you prepared to say that no action similar to this has ever been brought against boats either by underwriters or by owners of cargo?

A. I am prepared to say that I have never heard of any. I have never heard of any.

Q. You are not prepared to say that such suits have not been brought?

A. I am not, but I have never heard of any.

Q. Do you get also a rebate on this insurance premium?

A. We do not.

67 Q. When the transaction is completed you make a draft on E. B. Brooke & Company, in New York, through a New York bank?

A. Through a Buffalo bank; yes, sir.

Q. For all the money that you have paid out?

A. Yes, sir.

Q. To wit, the $200 paid for back charges?

A. Yes, sir.

Q. Fourteen dollars insurance premium?

A. Yes, sir.

Q. The money advanced to the captain for tolls and river towing?

A. Yes, sir.

Q. And your own commission?

A. Yes, sir.

Q. Now, what is left to be paid to the captain in New York represents the reasonable compensation, doesn't it, to a boat captain for one of those trips from Buffalo to New York?

A. Oh, no, sir; probably he would only have a hundred dollars left in New York to collect. His freight amounts to $395. We take out this commission, the insurance, his tugging in Buffalo, if any, the trimming of the load which we paid for him, and then we may give him a hundred and fifty or two hundred dollars, and he might have a hundred dollars to collect in New York, or we might give him this two hundred and he might pay on his boat, which I see in this case he did—paid $240 on the boat "Worden," and only took thirty-four dollars and some cents to run down with on this boat. How much he took on the "Sydney" I don't know.

Q. This $395 is subject to deductions for trimming and your commissions, is it?

A. Yes, sir.

Q. And canal tolls, and so forth?

A. Yes, sir.

Q. Of course, if it were not subject to these deductions it wouldn't be so large?

A. No, sir.

Q. The owners wouldn't have to give so much?

A. No, sir.

68 Q. Isn't it often the custom in Buffalo, or do you not often in Buffalo get two certificates of insurance on one of these

shipments—one to cover the cargo owner and one to cover yourself for advances?

A. We do not, as a general thing.

Q. But it is sometimes done?

A. It is sometimes done. Some other parties do it, because the bank requires a certificate for these advances, and some other parties do do it. We hardly ever do it when dealing with such men as Mr. Meadows.

Q. But it may be done sometimes and may not be?

A. Yes, sir.

(By Mr. HYLAND:)

Q. It is only done where the bank wants further security from the scalper?

A. That is it.

(By Mr. McCARTHY:)

Q. You say that certificates have sometimes been returned to you?

A. Yes, sir.

Q. "When we have collected from the insurer." Do you mean there the certificates that represent your advances?

A. No, sir; we have sometimes had the main certificate.

Q. Have you so dealt with the Providence & Washington Company?

A. I cannot say for a certainty that we have, and I cannot say that we have not.

(By the COURT:)

Q. Do you have any voice in the running of the boat after the cargo is loaded?

A. Not any.

Redirect by Mr. HYLAND:

Q. Mr. Meadows received the signature of the captain to the shipping bill which you signed for Mr. Meadows. Was Mr. Meadows present when he signed that, or where is that signed?

A. It is signed in our office. He was not present.

Q. But the shipping bill is signed and sent to him after it is signed by the captain?

A. Yes, sir.

69 Q. So that the shipping bill is signed by you and the captain both which is made with Mr. Meadows?

A. Yes, sir.

Q. Then there is no other agreement between you and Mr. Meadows and the captain and Mr. Meadows except that bill?

A. That bill.

Q. That is all there is to it?

A. Yes, sir.

Q. Of course, Mr. Meadows knows that you are representing the boatmen in getting the load?

A. Yes, sir.

Mr. McCarthy: He may not know what Mr. Meadows knows.
The Witness: I am willing to admit I do not.

Q. When you ship grain in this way, as a common carrier or agent or acting in both capacities, do you ever ship without insuring your cargo?
A. We never do.
Q. Never do; you always insure your cargo?
A. Yes, sir.

70 Henry Morse recalled.

(By Mr. Hyland:)

Q. When you ship grain in this way, as a common carrier or agent or acting in both capacities, do you ever ship without insuring your cargo?
A. We never do.
Q. You always insure your cargo?
A. Yes, sir.

Henry Morse further examined.

(By Mr. Hyland:)

71 Q. In answer to a question put to you by Mr. McCarthy yesterday you stated that you had interest only in that part of the money which was paid to you, and that you had no interest in the money paid to Armour, Plankinton & Company, or words to that effect. What did you mean by that answer?

Objected to as calling for witness's construction.. Objection overruled.

A. That the money that was paid to Armour, Plankinton & Company was on the loss. They being owners of the grain, that portion of the money would go to them, we receiving the amount of our advances out of the loss, and the balance of money belonging to the owner, as we understand it, should go to them.
Q. If the owners were not paid this money who would have to pay it?

The Court: This is trying to argue with the witness questions of law and legal rights involved in this contest.

Claimant rests.

72 And claimant also excepted on the ground that the learned judge ought to have found that H. Morse & Company and Charles E. Wager, the claimant, entered into a contract with Meadows for the transportation of the cargo to New York, evidenced by a bill of lading, in which Morse & Company and Charles E. Wager described themselves as carriers and W. Meadows as shipper and Armour, Plankinton & Company as consignees.

Second.

In the third finding of fact:

The learned circuit judge further finds that H. Morse & Company "agreed with him (Meadows) to transport 7,900 bushels of wheat from Buffalo to New York on the boat 'Worden' and to insure the same for a freight of five cents per bushel;" to which the claimant duly excepted on the ground that there was no evidence upon which to base such a finding of fact. The only evidence upon which said finding is based is the bill of lading, Libellants' Exhibit No. 1, set forth in the third finding of fact and Libellants' Exhibits 2, 3, and 4, and Claimant's Exhibits A, B, and E, and testimony of Meadows and Morse above set forth, and the following testimony of Henry S. Sill:

Henry S. Sill, being duly sworn and examined as a witness for the claimant, testifies:

I reside in Buffalo; I am in the business of insurance there, and have been for seventeen years. In May, 1883, I acted for the New England Underwriters, where this cargo was insured. I am agent of that company. Exhibit A is in form the same as the policy, No. 772, issued to Morse & Co. We issue this kind of open policies every spring ourselves at Buffalo, and we deliver them to the
73 scalpers. They run for the season—that is, until the Erie canal closes. They are issued solely for business on the canal and rivers.

(By Mr. Hyland:)

Q. When that is issued in what manner do you take the risk on any single cargo under that open policy—what is the manner of insuring any single cargo under that open policy?

A. The application is made under this open policy in writing by H. Morse & Co.

Q. Look at that paper handed to you and see if that is a copy—a form of the application.

A. That is the customary form; yes, sir.

Mr Hyland: Now, I will ask the libellants to produce the application made for the insurance of the cargo—the application on which Exhibit No. 2 was delivered.

It is produced and offered in evidence.

Libellants' counsel objects to it as tending to add to or explain or contradict the contract of insurance, which is in writing.

It is admitted and is marked Claimant's Exhibit B. (Exception.)

Mr. Hyland: It reads as follows: "Worthington & Sill, general agents, New England Underwriters, canal insurance; office, No. 48 Main street and 10 Dayton street, Buffalo, New York. Insurance is wanted by H. Morse & Co.—loss, if any, payable ditto or order—on wheat on board, cargo of boat 'William Worden,' $9,875, from Buffalo to New York; rate, — cents, $—." (That blank ought to be supplied; that is in the original, I apprehend.) "Total premium, $—." Buffalo, May 17, 1883. H. Morse & Co., applicants.

(By the COURT:)

Q. What is the rate that is inserted in such a form?
A. I couldn't say.

Q. Does that specify the rate agreed on in each case?
74 A. We enter the rate according to the class of the boat as we insure it. I don't remember the class of that boat.

Q. Is the figure filled out—what is the actual contract, or is it merely a formal entry?
A. We enter that ourselves.
Q. With reference to the exact contract?
A. With reference to the exact contract. There is nothing in the contract policy that stipulates what the rate shall be.

(By Mr. HYLAND:)

Q. What is the premium in this case?

No answer.

(By the COURT:)

Q. Is the premium always inserted?
A. Yes, sir; we insert that ourselves.

(By Mr. HYLAND:)

Q. And charge to H. Morse & Company?
A. Yes, sir.

(By the COURT:)

Q. The premium is regulated by this particular boat?
A. Yes, sir; but boats are charged according to their class, so much, as first, second, and third class.
Q. Do you remember how this boat classed at that time?
A. I think she classed first.

(By the COURT:)

Q. That is put in this application, is it?
A. Yes, sir.
Q. Then the certificate also contains the amount of premium that is charged for the particular cargo?
A. No, sir.
Q. The certificate does not contain any premium?
A. No, sir; not as a general thing; they do not; sometimes they are entered on by request.

(By Mr. HYLAND:)

Q. On the presentation of this application (Claimant's Exhibit B) to you what did you do—what did you issue to H. Morse & Company, if anything?
A. We issued a certificate.

75 Q. Look at Exhibit No. 2 and see if that is the certificate which you issued to H. Morse & Company.

A. Yes, sir.

Mr. McCarthy: I will admit that it is, and that it was issued as soon as they got that application.

Q. When this application was made and the certificate issued what entry do you make on your books as regards the party insured, if any?

(By Mr. McCarthy:)

Q. Was an entry made in this case?
A. Yes, sir; there was an entry made.

Mr. McCarthy: Let us see the entry. I object to any oral testimony in regard to it.

(By Mr. Hyland:)

Q. Where was that entry made?
A. In the open policy book of H. Morse & Company.
Q. And in whose name was it made?
A. H. Morse & Company.
Q. I hand you a book. Please look at the entry made there under the name of William Wager and tell me if you know whose handwriting that is. It is dated the 17th.
A. Yes, sir.
Q. Whose handwriting is it?
A. It is the handwriting of Mr. Bently, our marine clerk.
Q. Tell the court what book that is.
A. It is the open policy book we issue; it is the book we issue to H. Morse & Company to keep a record of their insurance that they applied for.

(By the Court:)

Q. Do you mean that it contains the policy?
A. This book is mentioned in the policy. The different insurances we take out afterwards refer to the conditions of it. It is the condition which the insurance was afterwards made subject to. That open policy book does not cover any particular risk unless we
have special application made and entered up under the sub-
76 ject and conditions of that policy, and each insurance has to
be a separate entry, and it is subject to that policy. The number of the policy is stated in this book. That policy covers nothing until it is entered in this book.
Q. The open policy by itself amounts to nothing. It is merely preliminary, which takes effect according to entries, and this is the book which contains the entries?
(No answer.)

(By Mr. McCarthy:)

Q. It merely contains the general conditions by which you agree to be bound?

A. That is it.

(By the COURT:)

Q. And each particular piece of insurance which is adopted under the general policy?
A. Yes, sir.

(By Mr. HYLAND:)

Q. Please read the entry in that book on May 17, 1883.

Mr. MCCARTHY: Whose entry is it?
Mr. HYLAND: His own clerk's.

Answer (reading): "H. Morse & Company, boat 'William Worden,' from Buffalo to New York, $9,875; rate, 15 cents; premium, $14.82; wheat."

The COURT: It ought to be noted that these books contain these entries under the various columns, which are headed, "date," "on whose account," "boat," &c., and that the name of H. Morse & Company is in the column headed "on whose account."

Q. (Handing witness a book.) Does that book have the open policy pasted in the beginning?
A. Yes, sir.
Q. Then this book ought to have that policy there?
A. I couldn't say that it is pasted in. It is customary for us to do that.
Q. Do you know what became of the policy itself?
A. No, sir.
77 Q. As matter of fact are there any entries made on this policy after it is issued at all?
A. No, sir.
Q. There are no names endorsed upon the open policy at all after it is delivered?
A. No, sir.
Q. It is all done on the book?
A. Yes, sir.

The open policy book is offered in evidence and marked Claimant's Exhibit C.

Q. Who paid the premium in this case, if any was paid?
A. H. Morse & Company.

(By Mr. MCCARTHY:)

Q. Was there a premium paid?
A. Yes, sir; the premium was paid. I suppose it was paid.
Q. Wasn't credit given as usual?
A. It was if it was paid. I didn't keep the accounts myself. I couldn't swear that it was paid.
Q. Don't you know, on the other hand, that in this case, as in every other, a credit of thirty days was given?
A. No, sir.

Q. Will you say it was not?
A. I don't know that credit was given. It is not customary to give a credit of thirty days; it is customary to give a week's credit.
Q. And this loss occurred before the week was up, didn't it?
A. I think not.

(By Mr. HYLAND:)

Q. Look at Exhibit C and see whether that shows whether the premium was paid or not?
A. Yes, sir.
Q. When was it paid?
A. It was paid May twenty-third.

(By the COURT:)

Q. Do you know by whom?
A. By H. Morse & Company.

(By Mr. HYLAND:)

Q. Did you say how long you had been an agent there?
A. Some seventeen years.
78 Q. When you took that risk for the company did you know the relation that existed between H. Morse & Company and Captain Wager, of the boat "Worden?"
A. I can't say that I knew it.
Q. Do you know whether the insurance company regarded that there was any relationship existing between H. Morse & Company and the captain of the boat?

Objected to on the ground that it is leading and because the witness has already said that he didn't know; that both parties are here and that it is not proper to ask this witness.

The COURT: He may state anything that he knows.

Exception.

A. I can only say that I have always regarded——

Mr. McCARTHY: You are to state only what you know in this particular case.

A. (Continued.) I only know from the fact of what has always been regarded.
Q. You mean with reference to the custom?
A. Yes, sir; with reference to the custom. I couldn't swear that Mr. Morse was his agent, but I know it was so regarded.
Q. Do you know that the company regarded him as such?

Objected to.

The COURT: I think it is competent to prove by this witness what the company intended to insure and whom and what interest they intended to insure in the act which they did. He may show what they understood on that subject, if there was any understanding about it.

Exception.

79 (By the COURT:)

Q. You may state what notice or knowledge or understanding the company had in regard to whom was to be benefited by this insurance when applied for.

Mr. McCARTHY: I think that question is objectionable as to form.

A. We regarded H. Morse & Co. as the ones to be benefited.

(By Mr. HYLAND:)

Q. Did you regard him as agent of the canal-boat?

Objected that that has been already overruled. Objection sustained.

Q. In what capacity, as common carrier or agent of common carrier or as owner or what?

Objected to on the ground that an agent of a common carrier cannot have any insurable interest, and that the question has already been excluded.

The COURT: I think it must be what knowledge or notice they had; the witness has already said that he does not know of these relations.

Q. Do you know of cases where the scalpers have failed to pay the premium in which you have demanded the premium then from the captain of the boat mentioned, when insured?

Objected to on the ground that it is too general.

(By the COURT:)

Q. Who was this policy understood to benefit? The question calls for all the persons whom the company had any notice or understanding would be benefited by this application.

80 A. I couldn't regard anybody else than those specified in the insurance. I don't know of anybody else.

Q. You mean either in the application or in the original policy?

A. Yes, sir.

(By Mr. HYLAND:)

Q. Are you in the habit sometimes of collecting the premium from the captains of the boats when the scalpers fail to pay it?

Objected to.

The COURT: I think I ought to permit this witness to show anything that is commonly practised by him, because anything of that sort must be presumed to be with the assent of his principals. If it can be shown by the practice of the companies under these applications that any particular course of business was in customary use, I think you are entitled to put that in evidence.

Q. Has it not been the custom and generally acted upon since you have been engaged in that business that whenever you insure a cargo in the name of the scalper, as in this instance in the name of H. Morse & Co., it was insured with the expectation that the benefit should revert to the captain of the canal-boat?

Objected to as contrary to what the witness has sworn to. Objection overruled.

A. I might qualify my reply in connection with my answer to that other question that I didn't know of anybody else benefited but H. Morse & Co. in this transaction. We don't, but I suppose——

By Mr. McCarthy: I shall object to his supposition.

81 A. (Continued.) I don't know how the boat—what relation Mr. Morse has in connection with the boatman, but this insurance might protect the boatman as well as Mr. Morse. If I understand the law, the boat can be held for this loss in case there wasn't any insurance.

Q. Isn't it understood that when Mr. Morse gets his insurance it is for the benefit of the boat, the carrier, the captain of the boat?

Objected to.

Q. Isn't it understood between the company and Mr. Morse and you that he is getting this insurance out so as to protect the boat from loss in case the cargo is damaged under her liability as common carrier?

Objected to as wholly incompetent and inadmissible; that any arrangement between this gentleman and Mr. Morse and the captain of the boat is not binding on the owner and cannot be binding on the company.

The Court: I will allow the witness to show any understanding by the company as to whom will be benefited by the insurance. I instruct the witness not to give any opinion as to what may be his view of the law. I shall allow simply a question as to the understanding on the part of the company as to the persons whom they design to protect by the insurance.

(By the Court:)

Q. In insuring in this way—receiving this application and making that entry in your policy book—do the company understand
that the design is, on their part, to benefit anybody else besides Mr.
Morse? Do they understand that that was designed to pro-
82 tect the boat against loss, as the carrier of the goods, as well
as Morse & Co.?

A. Yes, sir.

(By Mr. Hyland:)

Q. At the time the policy is issued is there any understanding of any kind that you are to protect any one else by that insurance except Mr. Morse and the boat, as, for example, the consignee of the cargo or the owner of the cargo; do you know any one else?

A. No, sir.

(By the COURT:)

Q. You say that so far as you know the company do not design to protect the owners of the goods?

A. I say I don't know anybody but Morse & Co. to be protected under that policy and the boatman.

(By Mr. HYLAND:)

Q. Have you settled up many losses since you have been agent there?

A. Yes, sir.

Q. Have you known of a single instance where the insurance company has paid the loss on an endorsement of this certificate that the insurance company have thereafter made any demand upon the boat, on the ground that they are subrogated in the position of the owners of the cargo whom they paid?

A. Not on the boat that held the cargo.

Q. Have they ever, to your knowledge, brought a claim against the boat or the captain of the boat where she has been insured in the manner in which this was?

Objected to. Objection overruled.

A. I can't recall a case.

Q. Did Mr. Morse & Company do all their business in your company that season, or do you know whether they did or not?

A. I don't know that they did; I think not.

83 Cross-examined by Mr. McCARTHY:

Q. You are no longer the agent of the companies, are you?

A. No, sir.

Q. When did you cease to be agent of the company?

A. I think it is about a year ago.

Q. Your firm of Worthington & Sill are no longer agents of the companies, neither of them?

A. No, sir.

Q. You came here at the request of Mr. Morse, didn't you?

A. Yes, sir.

Q. (Handing witness a letter.) Did you write me that letter?

A. That is my handwriting; yes, sir.

The letter is marked Libellants' Exhibit No. 4 for identification.

Q. (Handing witness another letter.) And likewise this letter?

A. Yes, sir.

The letter is marked Libellants' Exhibit No. 5 for identification.

Q. Did you draw that receipt?

A. No, sir.

Q. Was it drawn by your office?

A. Yes, sir.

Q. That is the same thing, isn't it?

A. Yes, sir.

Q. It is drawn by your office?

A. Yes, sir.

Q. At the time that receipt was signed by H. Morse & Company did you, acting for our companies, pay him some money?

A. Yes, sir.

Q. Look at the paper and see how much you paid him?

A. We paid him five hundred and twenty dollars.

Q. That included this very premium, didn't it, that Morse & Company had paid?

A. That five hundred and twenty dollars? No.

Q. That five hundred and twenty dollars, it is said in this receipt, represented Morse's interest.

A. Yes, sir.

84 Q. Is that true? What are you hesitating about? Did it or didn't it?

A. Yes; it is his interest, I suppose.

Q. And you undertook to be subrogated to that extent, didn't you, in Morse & Company's right?

A. Yes, sir.

Q. That is to say, if he had a bigger interest—provided you were treating your company honestly—you would want a bigger subrogation?

A. Yes, sir.

Q. Assuming that you are an honest man and got that subrogation from Morse, you intended to get a subrogation to all Morse's rights, didn't you?

A. Yes, sir.

Q. The companies were subrogated to the extent of five hundred and twenty dollars?

A. Yes, sir.

Q. How did Morse get that interest?

A. I suppose it is his interest as common carrier.

Q. I don't want what you suppose. What do you know about it; what was his interest? If you don't know say so.

A. That interest is the earned freight and the back charges—the lake charges and the freight that is earned.

Q. Precisely; and that represents all of Morse's interest, doesn't it?

A. That is the bill.

Q. Because that is all the subrogation you have got?

A. Yes, sir; that is all the interest he had.

Q. Pray tell the court against whom that subrogation was effected.

A. Against Morse & Company.

Q. Effected against whom?

Objected to on the ground that the witness is not supposed to be competent to answer.

Q. How long have you been in the insurance business?

A. Seventeen years.

85 Q. You know what subrogation means, don't you?

A. I do.

Q. You speak here of being subrogated. Subrogated against whom?

The same objection.

Q. Subrogated against what or whom? Wasn't it against this carrier's interest?

A. Give me time to think. I understand what subrogation is, but I can't recall exactly whom that subrogation receipt would be against in that case; that was merely a form drawn up——

Q. Let me help you. Don't you think that would subrogate, provided the carrier or owner of this boat had been guilty of negligence—that that would have subrogated your companies against that boat for any rights that Morse might have had?

A. That is not exactly clear to me.

Q. Assuming that this grain had been lost through the negligence of the canal-boat, don't you understand and didn't you understand that this subrogation gave you whatever right Morse had against that negligent canal-boat?

A. I didn't think anything of the kind at the time, because that receipt was drawn up by order, I suppose, of somebody in our office, taking the common, ordinary form of subrogation receipt in paying a loss of that kind. I don't think the thing was taken into consideration, whom this subrogation was against.

Q. Assuming that the loss had been occasioned through the negligence of the canal-boat, would you not have been of the opinion that it did give you the right of subrogation against the canal-boat?

A. I should think so; yes. I didn't give the matter any thought at all when that receipt was taken.

86 Q. And it would give you that right because of your having paid Morse $520?

A. Yes, sir.

Q. Now, this certificate is issued to cover $9,875, is it not?

A. Yes, sir.

Q. Deduct from $9,875 the sum of $520. Do you take me?

A. Yes.

Q. And doesn't the residue stand for the value of the cargo?

A. No, sir.

Q. What does it stand for?

A. It stands for the amount of insurance. The certificate as it stands there is to represent the amount of the insurance, irrespective of the value of the cargo.

Q. Take the amount paid by the New England Underwriters, $9,211.75, to Armour, Plankinton & Company. Does not that sum represent or contain the whole value of that cargo?

A. No, sir.

Q. What does it contain?

A. It represents the value of the cargo less the earned freight and the back charges.

Q. Precisely; that is all I ask for. You didn't pay that money in Buffalo, did you?

A. I think I sent it to New York.

Q. You sent it to James Matthews, in New York?

A. Yes, sir.

Q. And you told James Matthews to whom to pay it?

A. Yes, sir.

Q. You told him to pay it to Armour, Plankinton & Company?

A. Yes, sir.

Q. And you did that because you knew that Armour, Plankinton & Company were the owners of the cargo, didn't you?

A. Yes, sir.

Q. Separate firms?

A. I don't know about that.

(By the Court:)

Q. To what extent is the transportation or procuring of boats for the transportation of grain from Buffalo to New York carried on through the intervention of scalpers in Buffalo?

A. It is all done so, or nearly all, I believe. They act as middlemen between the shipper and the boatman.

87 Q. Then, in your judgment and observation, you say there is very little direct engagement of freights by the owners of the boats from the shippers?

A. Very little of it.

Q. Very little direct action?

A. Very little direct action.

Q. These people are called scalpers because they take off a commission from what the boatmen would have otherwise entire?

A. I never knew how the name originated. It has been used a great many years. I suppose that is it. I never use the word.

(By Mr. Hyland:)

Q. In reference to the manner in which you have done your business in your office there, how have you done it?

A. I have done it the same that all other companies in the canal business have done it during my experience for seventeen years.

Q. Has there any question ever been raised between you and the company, directly or indirectly, with reference to any mistake or error in your work?

A. Never.

Q. Your company lost money last year?

A. Yes, sir.

Q. And did any others more or less than yours; did that company lose more than the other companies?

A. I think our company lost less than any other company.

The Court: I don't think this is necessary.

HENRY S. SILL further cross-examined.

(By Mr. McCARTHY:)

Q. After that cargo had been abandoned and a deed of cession made to the companies did you proceed to recover such of the grain as could be recovered after the loss?

A. We proceeded to recover as soon as we heard of the loss of the grain.

88 Q. Was that before or after this abandonment?

A. I don't know when that abandonment was put in. I can't remember.

Q. (Handing witness the abandonment.) It is dated the 26th day of June.

A. I don't remember of ever seeing this abandonment.

Q. Mr. Matthews was acting for you here, wasn't he?

A. Oh, yes, sir.

Q. Did you proceed to recover what you did of the cargo before or after that, or don't you know?

A. I know we did it before the 26th day of June, and this is dated that day.

Q. How do you know?

A. Because the loss occurred before, I think, if you will allow me to refer to my memorandum.

Q. How do you know you proceeded to rescue the cargo before the 26th day of June?

A. (Referring to a memorandum.) Because the loss occurred on the 29th day of May.

Q. Have you any other reason?

A. No, sir.

(By the COURT:)

Q. You took steps in regard to the cargo before the abandonment?

A. Yes, sir.

(By Mr. McCARTHY:)

Q. (Handing witness a paper.) Is it true that you recovered from the sunken boat cargo which you afterwards sold for $3,335.96?

A. (Referring to memorandum.) $3,335.86 I have it in my memodum.

Q. And that is true, is it?

A. Yes, sir; that is the net amount received.

Q. And that money was retained by the insurance companies?

A. Yes, sir.

(By the COURT:)

Q. Did you have anything to do personally with attending to the wreck?

A. No, sir.

(By Mr. McCARTHY:)

Q. Under and by what authority did you do all those things?

A. By the authority from the companies.

89 Q. On what principle or theory were you acting in taking that cargo, selling it, and appropriating the money?

A. On the principle that it comes within the province of the duties of the general agent of the insurance companies.

Q. You treated that as the cargo of the persons insured and which you paid for?

A. Yes, sir.

Claimant's counsel asks that the last question be read, and thereupon states that he objects to it as to form.

The Witness: I would not like to answer yes, sir, to that question as it was put to me.

By the Court:

Q. Do you wish to correct your answer?

A. I wish to say that we treated it as the cargo of the party whom we insured.

By Mr. McCarthy:

Q. That is what I asked you.

A. And you added "and paid;" that makes it entirely different.

Q. You would have paid people whom you had not insured?

A. I would upon the order of the assured.

By the Court:

Q. The point I would like to know is upon what preliminary authority you took possession of the cargo that was sunken?

A. It was under a custom prevailing in the management of the business.

Q. If the cargo was only slightly damaged, you don't mean that you take possession?

A. We do in cases of partial loss—yes, sir; it has been the
90 custom when we hear of a loss, no matter how large or small, to send our man, or any party we choose to send, to protect the interests of the insurance company.

Q. Would you if there is a loss of ten per cent.?

A. Oh, no, sir.

Q. I asked you upon what preliminaries you took possession of this cargo?

A. Because we considered it a total loss as far as the assured was concerned; that he would have a right to abandon.

Q. Upon what preliminaries do you act, if you know of any?

A. Under the custom in such cases that we always act under.

Q. Do you know whether there was any correspondence, a word of any kind, that passed between you and the agents of the company and any of the persons assured or interested?

A. Yes, sir; Mr. Morse came in and notified us with a telegram that the boat was sunk.

Q. That is so much; now, what else?

A. We immediately took steps to recover as much of that cargo as we could in both its sound and damaged condition.

Q. Do you mean to say that you went on upon that notice without anything further?

A. Yes, sir.

Q. Assuming that the cargo would be abandoned, and accordingly you acted upon the mere notice that it was sunk?

A. Yes, sir.

By Mr. McCarthy:

Q. You have a gentleman in New York by the name of Matthews, who is your agent?

A. Yes, sir.

Q. Didn't you in point of fact act through Mr. Matthews?

A. Yes, sir.

Q. And the preliminary arrangements were made here in New York, were they not?

A. Not all.

Q. Some of them were?

A. Some of them were.

91 Q. For example, Mr. Matthews employed the men that went and raised the cargo?

A. Yes, sir.

Q. And Mr. Matthews, as you said yesterday, paid the money to Armour, Plankinton & Company?

A. Yes, sir.

Q. And he got this deed of cession and abandonment from Armour, Plankinton & Co.?

A. I don't remember.

Q. Well, you didn't get it?

A. No.

Q. And Mr. Matthews got the proof of loss too, didn't he?

A. I suppose he did.

Q. If there was one he got it?

A. Yes, sir.

Q. What other preliminary arrangements were there that you attended to and that he did not?

A. We telegraphed to a party in Albany who has acted for us in similar cases to go and see to that cargo.

Q. Who is he?

A. Mr. Austin.

Q. Did he go?

A. Yes, sir; and I think also to Mr. Kennedy, a gentleman in this locality, where the boat was sunk.

Q. Do I understand you to say, as an insurance dealer, agent, or what not, that you would give A an insurance on property, whether he owned it or not, and then when the property had been constructively lost you would go and take it and sell it and keep the money, no matter whether A owned it or not?

A. We do that.

Q. Well, did you ever hear of anybody having the right to abandon cargo that had been insured, except the owner of it?

A. I don't know as I have.

Q. What is your opinion as an insurance man—do you think anybody has got a right to abandon insured cargo or property except the person who owns it?

A. No, sir; I think the owner is the proper person to issue the abandonment.

Q. What inference would a man of ordinary common sense
92 draw from this act—an insurance company accepting an
abandonment from A—that A was the owner, wouldn't he?

A. Certainly.

Q. Did you ever hear of anybody abandoning property who had not been insured?

A. No; abandoned property that had not been insured to whom?

Q. Did you ever hear of anybody abandoning property to an insurance company who had not been insured by the company?

A. No, sir.

Q. Abandonment follows an insurance?

A. Yes, sir; but not in all cases.

Q. And the only person that can abandon is the person that has been insured, isn't it?

Objected to as a matter of law. Objection sustained.

Q. You spoke yesterday as if you thought, as if it was understood, that this insurance that was effected was for the benefit of the carriers as well as for the owners?

Mr. **Hyland**: I object to that as to form; he did not say so; he said the owner was not insured.

Q. Don't you know that when this certificate of insurance was issued that it was attached to the bill of lading and taken directly to Meadows, the agent of the owner?

A. No; I didn't know it.

Q. What was said, if anything, which would have led you to understand or infer that these boats were to have the benefit of that insurance, or this boat, the carrier boat, was to have it?

A. Nothing was said in connection with it; I have had no conversation with anybody in particular in regard to these risks when taken—in regard to whom is benefited.

93 Q. Then what you were testifying to yesterday was merely
your general understanding?

A. My general understanding.

Q. And nothing that has any special application to this case?

A. I think my understanding would have.

Q. It was your understanding?

A. Yes, sir.

Q. And not anything that had special reference by contract or words to this case?

A. No, sir.

Q. Let me test your understanding a little further. Suppose that the carrier, after taking the cargo, had negligently lost it on the way to New York, is there any such understanding as you refer to that would have then exempted the carrier from liability to the owner?

A. No, sir.

Q. Or to the insurance company, when subrogated to the owner, in case the carrier had been negligent?

A. If the carrier presented the claim for the loss and his negligence could be proved we would not pay it to the carrier.

Q. That is a provision in your policy?

A. Yes, sir.

(By the COURT:)

Q. That is in the form that is pasted in the beginning of the book?

A. Yes, sir; that is a condition in the policy.

(By Mr. McCARTHY:)

Q. You say that if the carrier had been guilty of negligence and loss from this cargo running against the bank or into an island or into another boat that there is nothing, in your understanding, that would have prevented the owner from holding him for that loss?

A. The owner could hold him for the loss; yes, sir.

Q. That is the understanding?

A. Yes, sir.

Q. There is no understanding in Buffalo to the contrary, is there?

A. No, sir.

Q. Is there any reason in the world—answer the question, if you can, and, if you can't, don't; I don't care—supposing the insurance company is subrogated to the owner, why can't the insurance
94 company hold the carrier for his negligence? Is there any understanding to prevent that?

Objected to.

A. I think the company could hold the carrier; yes, sir; so far as the value of the boat.

Q. What I am asking for is, there is no understanding in Buffalo that you know of to prevent it, is there?

A. No, sir.

Q. And you didn't mean to say yesterday that there was?

A. I don't know that I did.

Q. You recognize the fact that a carrier has an insurable interest in the cargo?

A. Certainly, I do.

Q. And that an owner has?

A. Yes, sir; an owner has.

Q. You never heard of an insurance company insuring both the carrier and the owner for one and the same premium and in the same certificate?

A. I don't know as—no; I don't think we have.

Q. Such a thing would be most absurd?

A. Yes; I don't think we have.

Q. Because the obligation of an insurance company to an insured owner would be entirely different from what it was to an insured carrier?

A. It amounts to about the same thing, so far as the insurance company is concerned.

Q. Let us see. In the first place, if you insure a carrier you don't get any subrogation—I mean ordinarily?

A. No, sir.

Q. Whereas if you insure an owner you always have a right of subrogation?

A. Yes, sir.

Q. And that is an important matter, isn't it?

A. Yes, sir.

Q. And it would make a great difference in the premium?

A. It would make no difference in the premium.

95 The COURT: These are matters that are not of sufficient importance to warrant further examination.

Q. There are certain conditions in this policy; you say you did insure the several persons whose names are indorsed hereon as owner, advancer, &c., and that in this particular case you waived it?

A. It says in there or in a book provided for that purpose; I put it in the book.

Q. You could have waived it?

A. We enter it in the book instead of the policy.

Redirect by Mr. HYLAND:

Q. Do you know, as matter of fact, that Messrs. Morse & Company act there as agents for boatmen?

A. Yes, sir.

Q. In shipping grain?

A. That is my understanding, that they act as agents.

Q. For the captains of the boats?

A. For the captains of the boats; to what extent I can't tell.

Q. Do you know, as matter of fact, that they receive commissions for acting as such agents in shipping grain?

A. I understand they do.

Q. Do you understand, as matter of fact, that the captains of the boats pay the premium that is paid to you—to Morse to pay you?

Objected to as leading.

A. I understand that it comes from the captains—the premium.

Q. And you understand that the captain is thereby insured so far as the captain of the boat is the carrier?

Objected to. Question withdrawn.

96 Q. Before you paid this loss to Armour, Plankinton & Company what did you receive from them. Did they return you any paper of any kind before you paid this?

A. The receipt for the loss.

Q. What else; did they present the certificates?

A. The certificate; yes, sir.

Q. The certificate was delivered by them to you?

A. Yes, sir.

Q. And was that the order on which you paid this money to Armour, Plankinton & Company?

A. Yes, sir.

Q. Was there any particular average in this case of insurance?

A. Yes, sir.

Q. Whom was that charged against?

Objected to.

(By the COURT:)

Q. What did it arise out of?

A. Our policy says that in case of loss of any kind seventy-five dollars must be deducted as an average, and there is no claim unless it comes to that amount.

Q. The average is simply that provided for by the policy?

A. That provided for by the policy; yes, sir.

Q. And it was settled accordingly?

A. Yes, sir.

(By Mr. HYLAND:)

Q. By whom was that settled?

A. By Morse & Company.

Recross by Mr. McCARTHY:

Q. The sum of $75 was deducted out of the amount that you had insured, was it?

A. Yes, sir.

Q. You paid so much less?

A. Yes, sir.

Q. To whomsoever you paid?

A. Yes, sir.

Q. Do you know whether the captain in this case paid any premium at all or not?

A. No, sir; I only understand that he did.

Q. I don't ask what you understand.

A. I don't know that he did.

97 Q. Don't you know that in this case, as in any similar case, the premium was a lien against the cargo just as much as a canal toll?

A. Yes, sir.

Q. You don't know anything about whether the captain paid it or not?

A. No, sir.

Q. Did you come here under a subpœna from Morse & Co., or at their request?

A. I understood I would be subpœnaed.

Q. I don't ask you that.

A. I came at their request, but unwillingly.

The COURT: I would like to ask this witness a few questions.

Mr. McCARTHY: I suppose your honor will give me the right to except; I shall object to our company's being bound by any contract this man may have made that had not any consideration to support it.

By the COURT: How long have you been in this insurance business in Buffalo?

A. I have been as principal seventeen years, about; I entered an insurance office in 1862.

Q. How long have you been acquainted with the transaction of business like that of Morse & Company?

A. It is about that.

Q. During all the time?

A. Yes, sir.

Q. During that period you have been issuing insurance policies of this same character that you have stated here?

A. Yes, sir.

Q. Such as you call open policies in the beginning of the year?

A. Yes, sir.

Q. With a policy book, so termed, attached to the policy?

A. Yes, sir.

Q. Are there other persons besides Morse there that follow the same business?

A. Yes, sir.

Q. How common is it—how extensive?

A. There must be in the neighborhood of fifteen parties or twenty that are engaged in the same business as Mr. Morse is.

98 Q. And how long have they been?

A. As long as I have been in the business, different parties, from time to time, and long before that, too.

Q. The term "scalper" is a common name there, given to persons in this business?

A. Yes, sir.

Q. In dealing with them and in issuing policies and insurance certificates of this kind what is the understanding of the company in regard to the ownership of the cargoes insured?

A. It is understood that we protect the carriers.

Q. I don't mean what you protect; I mean to the ownership—whether the scalpers are understood to be the owners or not to be?

A. They are understood not to be, as a rule; in some cases they are the owners.

Q. Is there any different course of business where they are owners, where they are known to be owners, from the cases where they are not known to be?

A. No, sir; we insure in the same way.

Q. The same entries are made in the policy book?

A. Yes, sir.

Q. Is the same form or method of insurance practiced in reference to persons in other kinds of business—that is to say, by a policy of this sort attached to a policy book—or was this devised in reference to this class of business?

A. It is devised, I think, in reference to this class of business.

Q. I understood you that a policy of this kind was issued for the season?

A. Yes, sir.

Q. How many transactions may there be issued under such a policy, an indefinite number?

A. An indefinite number.

Q. From the spring to the close of the season?

A. Yes, sir; an indefinite number.

Q. Is the original policy limited to any amount?

A. No, sir.

99 Q. It has been proved here that the customary mode of scalpers obtaining business from the shippers was to provide insurance and a certificate such as you have issued here to accompany the bill of lading which would be sent to the consignees; have you or not any knowledge in regard to that practice as the ordinary practice in business?

A. In a general way, I have; I know that it is done; I know that is a practice.

Q. Did your company know that that was the usual practice?

A. I presume they did; they had been in this business before I went with them.

Q. It was the usual practice?

A. I think it is; yes, sir.

Q. Would it then be correct to say that your company would be practically aware that when such a certificate was applied for it was applied for to accompany a bill of lading to go with the goods?

A. Yes, sir; I think it would.

Q. Did you also have knowledge of the general mode in which the scalpers transacted their business with the captains of boats?

A. Yes, sir.

Q. You have already said that you were aware that they were paid a percentage on the rate for transportation?

A. Yes, sir.

Q. And your information was also that the insurance that was paid by the captains of the boats was reimbursed to the scalpers?

A. Yes, sir.

Mr. McCarthy: I think I must except to that question.

Q. It has been testified here that the scalpers were in the habit of making advances to the captains of the boats. Were you aware of that fact?

A. Yes, sir.

Q. It has also appeared that the scalpers, certainly in some cases, signed the bill of lading for the goods. Had you any knowledge of that practice?

A. Yes, sir.

Q. Do you know whether that was a usual and customary practice?

A. I think it is; that is what I consider the custom.

100 Q. That is your understanding—that the scalpers sign a bill of lading, as well as the captain of the boat.

A. Yes, sir; that is my understanding.

Q. In this particular case, then, was there anything different in your understanding at the time the certificate was issued from the ordinary practice as you understood it?

A. Not in the least.

Q. You suppose, then, it was in conformity to the ordinary practice of this business as you have stated it?

A. Yes, sir.

(By Mr. McCarthy:)

Q. These advances made by the scalper to the captain are simply to cover the journey expenses to New York, are they not?

A. Yes; he furnishes the captain money to pay his expenses.

Q. To pay toll and buy his teaming and towing on the river?

A. Whatever the expenses are in connection with the trip.

Q. But what the captain gets for his share of the work doesn't come until he gets to New York and hands in his cargo—delivers his cargo?

A. The captain would get it if it had not been advanced—I understand the captain didn't—the freight is paid to whom the boat is consigned to, not the cargo; all the captain gets in New York is the amount of freight over and above what has been advanced by the scalper in Buffalo.

Q. That is the captain's bonus for his services?

A. His compensation for carrying the property.

Q. The freight is not paid until it is earned?

A. That is right.

Q. And these boats have their consignee in New York too, have they not, as well as the cargo?

A. I believe they have.

101 Third.

In the fourth finding of fact:

The learned circuit judge found in the fourth finding of fact that "at the time Morse & Company executed and delivered the bill of lading to the agent of Armour, Plankinton & Company the claimant, as master of the 'Worden,' also executed a duplicate bill of lading, describing himself as carrier, and delivered it to said agent. The first-named bill of lading was signed also by the master of the 'Worden;'" to which the claimant duly excepted on the ground therein set forth. The only evidence upon which this finding is based is the original shipping bill set forth in the third finding of fact and the testimony of Meadows and Morse, above set forth.

Fourth.

In the fifth finding of fact:

The learned circuit judge found that "by the agreement for the transportation of the cargo between Morse & Co. and the claimant the latter was to receive five cents per bushel as freight, less the amount to be paid as premium for insuring the cargo and less a commission of five per cent. upon the whole freight money to Morse & Co.;" to which the claimant duly excepted. The only evidence in support of this finding is the agreement between Morse & Co. and the claimant, in writing, set forth in the third finding of fact, and the testimony of Henry Morse, above set forth.

Fifth.

In the ninth finding of fact:

102 The learned circuit judge found that "the boiler had not been thoroughly tested or examined since the preceding July," and that "at Troy, New York, no thorough examination or special test of the boiler was made to ascertain what its condition really was. The condition of the boiler was such that the defects existing would have been discovered if a thorough examination and test had been made;" to which the claimant duly excepted for the reason therein stated. The only evidence upon which said finding is based is as follows:

103 U. S. Circuit Court, Southern District of New York.

THE PROVIDENCE WASHINGTON INSURANCE CO.
against
THE STEAM CANAL-BOAT "SYDNEY" and THE CANAL-BOAT "WILLIAM WORDEN."
Before Sam'l H. Lyman, Esq., Commissioner.

Examination of Witnesses Pursuant to the Annexed Order Entered in the Above-Entitled Action Permitting Further Testimony.

NEW YORK, *May* 13, 1886—1 o'clock p. m.

Present: Edward D. McCarthy, Esq., for libellant; J. A. Hyland, Esq., for claimant.

JAMES INSLEE, called on behalf of claimant, being duly sworn, testified as follows:

Direct examination by Mr. HYLAND:

WITNESS: My name is James Inslee. I now reside in the town of Galen, Wayne county, in the State of New York. I am in the grocery and provision business. In the spring of 1883 I was a boatman on the steam canal-boat "Sydney," and master wheelman. I went on board of her at Buffalo on May 14th, 1883. She left 104 that port on the 18th, I believe, with the canal-boat "William Worden" in tow. Both boats were loaded, and the "Worden" was attached to the "Sydney" by couplings attached to the head of the "Sydney."

Q. Do you know whether that was the ordinary way of fastening such tows to a steam canal-boat?

A. Yes, sir.

Q. Who else constituted the crew, as you recollect, when you started from Buffalo on the "Worden" and "Sydney"?

A. I don't know the name of all of them. There was six men out of Buffalo on the steamboat.

Q. Name what you can of them.

A. Mr. Riley; my son, George Inslee. There was a man that they called Hank and another they called Frank, Captain Wager, and myself.

Q. Is that all the names you remember?

A. That is all.

Q. Did anything happen from the time you started with the tow more than ordinary things; and, if so, when, and what was the first thing that happened to the tow?

A. The first thing that happened to our tow was near Schenectady. The boiler took to leaking a little.

Q. In what way, if you know, did the boiler commence to leak?

A. It leaked along the flues—the bottom of the boiler.

Q. What was done then?

A. Worked the boat to Troy and stopped there and got a mechanic and had her repaired.

Q. Do you know when those repairs were made?

A. Yes, sir.

Q. What date?

A. They were made on the 28th of May.

Q. Do you know by whom the repairs were made?

A. They were made by a man from Mr. Pinkerton's works.

Q. How long did you remain there in making the repairs?

A. The boat laid there nearly the whole day.

Q. The whole day?

A. Quite the whole day.

Q. And then what did you do?

A. Then we got up steam and proceeded on our voyage down the river.

105 Q. When did you start down the river?

A. We started from Troy on the night of the 29th of May.

Q. Do you remember what time in the evening or night or morning you started from Troy?

A. We started from Troy, I should think, about seven o'clock in the evening.

Q. What time did you start from Albany?

A. We started from Albany about four or five o'clock the next morning; I can't tell within an hour or so.

Q. Where did you lay the night before you started at Albany?

A. We laid at East Albany; we stopped there to put on coal; coaled up there that night.

Q. Which was your ordinary trick, the fore part or after part?

A. The fore part of the night.

Q. And fore part of the day?

A. And fore part of the day.

Q. Did you wheel the fore part of the 29th during the day?

A. Yes, sir.

Q. How did the tow get on that day?

A. All right.

Q. Anything happen at all?

A. Nothing.

Q. When did you take the wheel again in the night?

A. I took hold seven o'clock.

Q. Seven o'clock of the evening of the 29th?

A. Yes, sir.

Q. About where was your boat then?

A. A few miles above Rondout.

Q. What condition was the steamer and tow at that time when you took hold?

A. All right.

Q. Now, state from that time what happened up to the time of running onto the rock near Esopus Island.

A. Well, we run along until we got below Esopus light. After we got below Esopus light we noticed her escaping steam.

Q. What time was that?

A. I don't know. It was between 11 and 12 o'clock, I should judge.

Q. It was between 11 and 12 o'clock at night?

A. Yes, sir.

Q. Who were on duty at that time?

A. Captain Wager, Riley, and myself.

Q. Where were the balance of the crew?

A. At the cabin by the wheel.
106 Q. What doing, if you know?
A. In there sleeping.

Q. At the time you first noticed the escape of steam where was your tow in the river?

A. She was in the middle of the river.

Q. As to the channel, what part of the channel was it in?

A. She was in the channel.

Q. Is there more than one channel at the point of the river?

A. Yes, sir.

Q. Which of the two channels was she in?

A. We was in the west channel.

Q. What was the condition of the weather at that time?

A. Well, the night was somewhat dark. The wind was blowing from the west quite fresh.

Q. A fresh wind from the west?

A. Yes, sir.

Q. At the time you noticed the escape of steam where was Captain Wager?

A. He was near the wheel-house.

Q. Where were you?

A. I was inside near the wheel.

Q. Now, state what happened from that time.

A. Well, the steam began to escape pretty freely. A few minutes the steam began—he ordered me to shake her down. I did so and she sailed on slowly, and he began to look around, and he says, "Hold her in; her boiler has gone up," or something to that effect.

Q. Then what happened?

A. He hollowed for Riley there, and he went to look at the boiler a few minutes.

Q. Go on.

A. Well, about the next thing that happened he jumped in where I was and commenced to work at the lever and engine.

Q. Then what happened to your boats?

A. Then we was near the rocks—going onto the rocks.

Q. How were the boats being carried—in what direction?

A. She was carried down the river to the eastward.

Q. What carried her to the eastward?

A. Well, the current of the river.

Q. Then what happened?

A. She slid upon the rocks.

107 Q. What struck the rocks?

A. The boat "Worden" slid upon the rocks.

Q. Well, in what way was your vessel working at that time, if you know?

A. Well, Captain Wager was working her back.

Q. At the time you observed the steam was escaping from the boiler how far were you away from the rocks you found you were running on? How far were the rocks away from you to the eastward?

A. My opinion is there was forty or fifty rods or more.

Q. How wide is the channel there—the west channel?

A. I should say half a mile.

Q. What part of the rocks did you strike?

A. We struck the upper end of the reef.

Q. The north end of the reef?

A. Yes, sir.

Q. And the "Worden" was sunk?

A. Yes, sir.

Q. What became of the "Sydney?"

A. The "Sydney"—we got her loose from the "Worden" and anchored her off to the eastward.

Q. Did you examine the engine and boiler?

A. Yes, sir.

Q. What did you discover to be the matter?

A. I found the water running in the boiler; I found her boiler leaking pretty freely.

Q. Where was the leak in the boiler?

A. It was around the flues.

Q. Around the flues?

A. Yes, sir.

Q. After the "Sydney" was anchored how long did she remain there?

A. She remained there four or five hours.

Q. What became of her then?

A. She came on to New York—came on down the river.

Q. Do you know how she got to New York?

A. I do not; only hearsay.

Q. Was there anything done with reference to the anchor after the discovery that steam was escaping from the boiler—with reference to anchoring, if anything?

A. There was nothing done in reference to the anchor; not then.

Q. Could there have been anything done by the anchor to save the collision?

A. I think not.

108 Q. Will you state why not?

A. Well, if we had anchored we would have thrown both on the rocks.

Q. Did you have an anchor?

A. Yes, sir.

Q. Where was it?

A. It was on the bow; had two anchors, one on each boat.

Q. One on each boat?

A. Yes, sir.

Q. Where were they on each boat?

A. On the bow.

Q. On the bow of each boat?

A. Yes, sir.

Q. What is the duty of the wheelsman with reference to working the engine on the steam canal-boat "Sydney?"

A. Well, the wheels were in the hands of the engineer of the steamer at that time.

Q. How is it arranged so that the wheelsman can wheel and at the same time manage the engine?

A. A lever is rigged to the wheel-house, right at the hands of the wheelsman.

Q. What was the state of the tide at the time this happened?

A. It was ebb tide.

Q. What was the condition of the river as to the water—high water or low water?

A. Quite a freshet in the river.

Q. What was the apparent working condition of the steamboat "Sydney" before this accident happened?

A. She seemed to work all right; no trouble.

Q. Was there anybody from the river that came to the wreck during that night?

A. No, sir; not during the night.

Q. No one came there during the night at all?

A. No, sir.

Cross-examination by Mr. McCarthy:

Q. You have testified about this collision before, haven't you?

A. Yes, sir.

Q. That was August 25th, 1883?

A. It was in August; I don't remember the date.

Mr. McCarthy: You admit that date, don't you?

Mr. Hyland: Yes, sir.

109 Q. Now, are you sure that at the time of this collision the tide was ebb?

A. Yes, sir.

Q. Was it running strong?

A. Yes, sir.

Q. How strong was the current?

A. Well, it was quite strong; it was running strong. I can't describe it any better.

Q. You don't know how strong—no idea about that?

A. No.

Q. Give the distance, as nearly as you can, that you were away from the place of the collision when you first saw the steam escaping.

A. Well, I should think, perhaps, we were a quarter of a mile away.

Q. Do you think you were a quarter of a mile away when you first saw the steam escaping?

A. Yes, sir.

Q. Do you feel pretty sure about that? Is that your best judgment after mature reflection?

A. That is my judgment.

Q. You were at that time in the west channel?

A. Yes, sir.

Q. Whereabouts in the west channel—midway or to the eastward or the westward?

A. Well, I should say—I don't know as we was midway. I think it was a little to the eastward of the centre, perhaps.

Q. To the eastward of the centre, perhaps?

A. Yes, sir.

Q. Were you far to the eastward of the centre?

A. Not very.

Q. Well, it was a dark night?

A. Quite dark.

Q. You are not able to say, from having seen anything on either shore, just where you were in the channel, are you?

A. Not just how far.

Q. It was your intention to keep in about the middle of the channel, wasn't it?

A. Yes, sir.

Q. Have you any reason to believe that you were not about in the middle of the west channel?

A. Well, I think we wasn't in the middle; we was east of it.

Q. Well, how far, if you have any reason for saying? Tell me how far you were to the eastward of the middle of the channel. If it is mere guess-work, why, say so, and I will go on.

A. Well, I can't tell you how near.

110 Q. Well, it is mere guess-work how far you were from the middle of the channel, if you were not actually in the middle of the channel?

A. I can't be positive how near the channel was.

Q. Do you say it was dark?

A. Yes, sir.

Q. Did you have any lookout on the "Worden?"

A. Captain Wager was called.

Q. Did you have any lookout on the "Worden?"

A. There was no one on the "Worden" looking out.

Q. This anchor was forward of the "Worden," wasn't it?

A. Yes, sir.

Q. Was it attached to any rope?

A. Yes, sir.

Q. It was?

A. Yes, sir.

Q. Was it ready for immediate use if there had been anybody there to use it?

A. Yes, sir.

Q. Now, the six men that were connected with the two boats, you say three of them were where? You yourself were at the wheel, were you?

A. Yes, sir.

Q. And Wager was near you?

A. Yes, sir.

Q. I am speaking now of the time you saw steam escaping, when you thought there was trouble. At that time Wager was near you. Where was he? Was he in the wheel-house or outside of it?

A. He was outside at that time.

Q. Do you know just where he was?

A. He stood talking to me—stood leaning up against the wheel-house talking to me.

Q. Where was Riley?

A. My impression is——

Q. If you don't know say so.

A. I don't know really where he was. I know he was on duty. I don't know where he was placed.

Q. How do you know he was on duty if you don't know where he was?

A. He was around there all the time.

Q. At the time you first saw steam escaping wasn't Riley in the cabin?

A. He might have been.

Q. And didn't Wager have to call to him to come out of the cabin?

A. He did call to him when he saw there was danger.

Q. Didn't Riley come out of the cabin when the captain called to him?

A. It seems to me he did.

Q. Well, he did, didn't he? Answer the question.

A. I think he did.

111 Q. You have already sworn that he did?

A. I don't know that I did. I don't remember it. He came from somewhere.

Q. Where is the cabin on the "Sydney?"

A. The cabin on the "Sydney" was eastward of the wheel-house, near the centre of the "Sydney."

Q. How far is the cabin from the wheel-house?

A. A few feet.

Q. How many?

A. I don't know how many.

Q. It is 100 feet, isn't it?

A. No.

Q. Fifty feet?

A. No.

Q. Thirty feet?

A. No. It might be six or eight.

Q. No more than that?

A. No.

Q. Is the cabin situated so that you have to go under deck to get into it—go down a gangway?

A. Yes, sir.

Q. How far is the engine forward—the engine-room?

A. Well, the engine-room is right under the wheel-house; only a few feet.

Q. Is there a passage under the deck to the engine-room from the cabin?

A. Yes, sir.

Q. To get from one to the other you have to go up on deck?

A. Yes, sir.

Q. Now, are you very sure that the wind was blowing from the westward that night?

A. Yes, sir.

Q. You are positive?

A. Yes, sir.

Q. Was it blowing strong or light?

A. Quite a fresh breeze.

Q. To the eastward?

A. Blowing to the eastward.

Q. You are sure about that?

A. I am sure of it.

Q. And the tide was a strong ebb?

A. Yes, sir.

Q. Was the wind blowing strong enough to affect the tide?

A. I don't know. I don't know what it would take to affect it.

Q. Had you ever been a wheelsman on a steam canal-boat before this trip?

A. No, sir.

Q. This, then, was your first experience as a wheelsman going down the Hudson river?

A. Yes, sir.

Q. You say you were not only wheelsman, but you also had charge of the engine?

A. Yes; starting and stopping the engine.

112 Q. You had charge of the engine, hadn't you?

A. Yes, sir.

Q. You were the man to see whether the boilers were in working order or not?

A. No.

Q. Well, was there anybody there to do it except you, in the engine-room?

A. No; I took care of the engine.

Q. That will do. You have answered the question. I don't care for anything more. You don't know anything about the set of the ebb tide, do you, of your own knowledge?

A. I know from what I see.

Q. Do you know how the tide sets, then—the ebb tide?

A. Yes.

Q. How does it set? Take any point you please a quarter of a mile above those rocks, which way does the ebb tide set?

A. It sets from a point above the island—across the head of the island, eastward.

Q. You are sure about that, are you?

A. Yes, sir.

Q. The ebb tide from the west channel sets across the head of the island to the eastward?

A. A little west, but above the island.

Q. Take a quarter of a mile above it.

A. It set across the head of the island at that time.

Q. I am asking you what the natural set of the tide is, and if you know, say so, and if you do not, state it, and we will go on. What is the natural set of the ebb tide from the west channel, beginning at a point a quarter of a mile above the island—above those rocks?

A. It sets across the head of the island.

Q. So its natural tendency is to bring a floating object on those rocks?

A. Yes, sir.

Q. You are sure about that, are you?

A. That was the case while I was there.

Q. Are you sure that is a fact?

A. While I was there I am.

Q. Speaking of an ebb tide?

A. Yes, sir.

Q. Did you know that day of the collision?

A. I didn't know anything about it.

Q. Didn't know anything about the tide?

A. No, sir.

113 Q. What had been your business before you undertook this trip on the "Sydney?"

A. I had been working on a horse boat.

Q. You had been a horse-boat man?

A. Yes, sir.

Q. Never had been on a steam *boat* canal-boat before?

A. Never had worked on one before.

Q. How long had it been before this trip that you had been on a canal-boat at all as a working man?

A. From the fall before. It was in the spring; I commenced in the spring. I was working before.

Q. Did you have any interest in the "Sydney" or "Worden" yourself?

A. No, sir.

Q. Were you there simply on wages?

A. Yes, sir.

Q. Well, let us see. Did the "Worden" go on pretty hard or not?

A. No, sir; she slid up there very easy.

Q. Very easy?

A. Yes, sir.

Q. And the "Sydney" didn't go on the rocks at all?

A. No; I don't think the "Sydney" hit the rocks.

Q. Didn't go on hard?

A. No, sir.

Q. When the collision occurred where were all your men?

A. Three of us were on deck and the other two was asleep.

Q. Who were on deck?

A. Captain Wager, myself, and Riley.

Q. You were on deck?

A. Yes, sir.

Q. Was there anybody down in the engine-room?

A. No; I think not.

Q. You don't think there was anybody there?

A. No.

Q. Did you try to haul the "Worden" off during the night?

A. Yes, sir.

Q. What effort did you make and how did you make it?

A. We got the steamboat loose from her. She swung around and we anchored her.

Q. How did you try to get the "Worden" off?

A. That is all there was of it.

Q. You tried to pull her off?

A. Tried all we could.

Q. Did you try to work her off?

A. Tried to work her off the "Sydney."

114 Q. You don't know what the word "pull" means, do you?

A. We couldn't pull her off.

Q. You reversed the engines on the "Sydney," didn't you?

A. I suppose we did; Captain Wager did.

Q. You reversed the engine on the "Sydney?"

A. I did not.

Q. Did anybody?

A. I suppose they did. I don't know what he done with her; he was handling her at that time.

Q. You were trying to pull the "Worden" off, weren't you?

A. Yes; I suppose so.

Q. Had you uncoupled from the "Worden" at that time?

A. We uncoupled as soon as we could; it took some time to uncouple her.

Q. Were these efforts to haul the "Worden" off made before or after you uncoupled her?

A. Before.

Q. How long were you trying to haul her off?

A. Well, till we see she was filling with water.

Q. How long was that?

A. I don't know; some minutes.

Q. Wasn't it hours?

A. No; it was some minutes.

Q. At the time the "Worden" ran on the rocks wasn't the "Sydney" engine reversed?

A. I should think she was; I don't know; I think she was. Captain Wager was handling the levers then.

Q. He ought to know.

A. He probably does.

Q. When you found you could not haul the "Worden" off you uncoupled her?

A. We uncoupled her as soon as we could; yes.

Q. How far away did you anchor the "Sydney?"

A. I should think it was two or three hundred feet, perhaps.

Q. Two or three hundred feet?

A. Yes, sir.

Q. You backed up two or three hundred feet?

A. The tide took her right out to the eastward.

Q. Two or three hundred feet to the eastward. Is that it?

A. Yes, sir.

Q. It was still the ebb tide?

A. Yes, sir.

Q. You were on the "Sydney" still?

A. I was on the "Sydney" still; yes, sir.

115 Q. When did you leave the "Sydney?"

A. I left her after they took the provisions off the "Worden."

Q. What time in the morning was that?

A. I should say it was four o'clock.

Q. In the morning?

A. Yes.

Q. And then what did the "Sydney" do?

A. The "Sydney" proceeded on her course down the river.

Q. Proceeded on her course down the river?

A. Yes, sir.

Q. Got up steam?

A. I suppose some steam, more or less.

Q. Did she go away in tow of anything?

A. Not from there she didn't.

Q. Who went off on the "Sydney?"

A. All but myself.

Q. You were the only one that was left on the "Worden?"

A. Yes.

Q. Do you remember the name of the man who worked on the engine or boiler at West Troy?

A. I never knew him.

Q. Were you present when he was working on her?

A. I was there; yes, sir.

Q. Did you see what he did?

A. Yes; I saw him work on her.

Q. Were your fires drawn?

A. Yes, sir.

Q. Was there more than one helping him then?

A. No, sir; Captain Wager helped him some.

Q. Do you remember what that man's name was?

A. I never knew.

Q. Is he now here?

A. Not that I know of.

Q. What hour in the night, as nearly as you can fix it, did this collision occur?

A. I think it was near twelve o'clock, as near as I could judge.

Q. If it was not just twelve o'clock was it before or after that hour?

A. I can't say.

Q. The wheel-house on the "Sydney," I suppose, was on the after part of the boat?

A. Yes, sir.

Q. How far is it from the wheel-house on the "Sydney" to the bow of the "Worden?"

A. The bow of the "Worden?"

Q. Yes.

A. Well, it is 150 feet or more.

116 Q. Is it not more than that?

A. Maybe a few feet more.

Q. Where was this anchor that you spoke of?

A. It lay on the bow deck of the—one lay on the bow of each boat.

Q. Two anchors, one on the "Worden" and one on the "Sydney?"

A. Yes, sir.

Q. Were they both ready for use?

A. The one on the "Sydney" hadn't any line attached to it.

Q. That could have easily been done?

A. Yes.

Q. Quickly done?

A. We done it when we anchored her.

Q. That was very quickly done?

A. Yes.

Q. What seemed to be the trouble at Schenectady?

A. The boiler leaked some, only not as bad when we got there.

Q. Seemed to be leaking around the flues?

A. Yes, sir.

Q. You don't know enough about machinery to be able to tell what condition of things would produce the leaking?

A. Don't know anything about it?

Q. Whose business was it to feed the boiler with coal?

A. Mr. Riley's.

Q. Do you know how long Riley had been in the cabin?

A. Not long.

Q. Do you know how long?

A. No, sir; he was around there all the while.

Q. How far were you from the place of collision at dark?

A. We must have been fifteen miles or more, I should say.

Q. How fast were you running per hour before the trouble?

A. I should think we averaged three miles an hour, perhaps—near that.

Q. You made no attempt to anchor, did you?

A. No, sir.

Q. Did the captain call for anybody besides Riley after the trouble arose?

A. Yes, sir.

Q. Who?

A. He called for the men that was asleep in the "Worden."

Q. Was there a man there by the name of Gebhardt?

117 A. There was a man there by some name—I don't know what his name was—and my son.

Q. When did you first observe that you were drifting over to the rocks?

A. A short time before we went on it. I don't know what time.

Q. Did you observe that you were drifting before you observed there was trouble with the engine?

A. No, sir.

Q. I suppose if you had known then that you were drifting you would have tried to do something to prevent it?

A. I presume we would. I don't know.

Q. It was pretty dark, you say?

A. Quite dark.

Q. Well, at the time you discovered there was trouble with your engine did you appreciate the fact that the tide was running ebb, strong?

A. Yes; I knew that the tide was running.

Q. Did you know it then?

A. Yes; could tell it by running that we was running on ebb tide.

Q. Do you know how many pounds of steam she needs in order to steer?

A. I do not.

Q. There was nobody forward at all, was there?

A. No.

Q. What?

A. No; not at that time.

Q. Whereabouts was the "Worden" hit?

A. She was struck by a rock about one-third the way back from her bow.

Q. On her port side?

A. On her left-hand side.

Q. So she must have gone upon the rocks sideways?

A. Yes; she was drifting kind of sideways.

Q. How long after she struck did the "Worden" fill?

A. Well, it was an hour or so, I should say, before she was full.

Q. You didn't cease your efforts to get her off the rocks until you saw she was full of water?

A. We did all we could to get her off.

Q. You didn't stop your efforts to get her off until you saw she was filled with water?

A. We tried to get her off while we could.

Q. I suppose you have never been on a steam canal-boat since, have you?

118 A. I have not; yes, I have, too. I have been on the "City of Troy" since a short time.

Q. Where?

A. Here.

Q. Here in the harbor?

A. Yes, sir; I have never wheeled one since then.

Q. How long have you been in the grocery business?

A. Two years.

Q. Did the steam, as you saw, decrease in volume slowly or was it a rapid collapse?

A. Well, the steam left her very suddenly.

Q. Suddenly?

A. Yes, sir.

Q. You didn't drift very far, then, after you discovered the trouble until the steam had left her?

A. It was not but a little ways.

Q. Did the engine blow off after the collision?

A. Blow off?

Q. Yes.

A. Not that I know of.

Q. Do you know what I mean by that question?

A. I know what blow off means; yes, sir.

Q. Didn't make any noise?

A. Nothing, only what came from the boiler.

Q. Did she blow off?

A. No, sir.

Q. Didn't she blow off loud enough to be heard on shore?

A. No.

Q. Did she exhaust?

A. Not as I know of.

Q. Do you know she didn't?

A. No; I don't think she did. I am not positive.

Q. You don't know whether she did or didn't?

A. No.

Redirect examination by Mr. HYLAND:

Q. How long had you been running on boats on the North river before this accident?

A. I had been running on it for 25 years.

Q. For 25 years you had been boating up and down the North river?

A. Yes, sir.

Q. And on your own boats?

A. Yes, sir.

Q. Did you have any difficulty in uncoupling the vessels after the "Worden" struck the rocks?

A. We did, sir.

119 Q. What happened that made it difficult?

A. Well, the current held the "Sydney" down so hard that it jammed the coupling, and we couldn't uncouple it.

Q. Did anything happen in any way while you were uncoupling it?

A. Yes, sir.

Q. What?

A. Captain Wager was thrown in the river.

Q. Did you have any difficulty in getting him out?

A. We had to fish him out.

Q. Had to fish him out?

A. Yes, sir.

By consent of counsel witness signed his name to the stenographer's minutes.

Robert Pinkerton, called on behalf of claimant, being duly sworn, testified as follows:

Direct examination by Mr. Hyland:

Q. What is your business?

A. Boiler-maker.

Q. Where do you carry on your business?

A. Troy.

Q. How long have you been in business?

A. Fifteen years.

Q. How large a business do you conduct there?

A. I pay out the amount of $1,000 a month.

Q. Do you remember in May, 1883, of sending a man to repair the boiler on the steam canal-boat "Sydney"?

A. I do, sir.

Q. Do you remember of sending a man there to look at the job?

A. At the time he was at work there; yes, sir.

Q. Do you know what they did with the boiler?

A. Yes, sir.

Q. What was it?

A. He rolled and beat the tubes on the furnace head.

Q. For what purpose was that done?

A. For to roll them tight.

Q. Did you see the boiler with steam up after the job was done?

A. Yes, sir.

Q. What was the condition then of the boiler after the job was done and steam got up?

120 A. I don't know. The boiler was tight. The captain came to the shop and paid his bill.

Q. Will you look at that receipt and see whether that is your name—whether that is the receipt you gave (handing witness paper)?

A. Yes, sir.

Said paper is offered and received in evidence and marked Exhibit A of this date.

Q. The amount on the receipt shows for itself the amount you received for the job; that is how much?

A. $3.50.

Q. How much work did that require to make up that amount?

A. We charged $3.50 a day. I suppose we got through in about eight hours. I think it was an average day's work.

Cross-examination by Mr. McCarthy:

Q. Mr. Pinkerton, you know something about these steam canal-boats, don't you?

A. I do not.

Q. Don't you know much about them?

A. I do not.

Q. Do you know what kind of boilers they have?

A. I do. They have self-feeders, and some of them have what they call propelling boilers.

Q. They are very small boilers, are they not?

A. No, sir.

Q. And it requires constant looking after?

A. No question about that.

Q. They are liable, are they not, these little boilers, to get out of repair?

A. Yes, sir.

Q. And do get out of repair?

A. Yes, sir.

Q. Now, I want to ask you this question: You say your man was only one day at work upon this boiler?

A. A day; eight hours.

Q. And your bill was only $3.50?

A. Yes, sir.

Q. Now, did you thoroughly examine and repair that boiler?

A. No, sir.

Q. Did you test that boiler?

A. We did not.

Q. Did you pretend to thoroughly overhaul and repair it?

A. No, sir.

121 Q. Do you know what the condition of that boiler was as to dirt?

A. I do not.

Q. Do you know whether there was any dirt on her crown sheets?

A. That I couldn't say.

Q. You didn't look to see?

A. We can't see.

Q. That can't be known unless the boiler is taken apart?

A. Except to take the tubes out.

Q. What is the predisposing cause of leakage in those boilers?

A. Sometimes it is low water.

Q. What effect does dirt and grease on the crown sheets have?

A. It causes trouble, too.

Q. Well, don't that cause leakage?

A. Yes, sir.

Q. Isn't that a predisposing cause of leakage—dirt on the crown sheets?

A. Why, certainly, dirt on the crown sheets causes leaks.

Q. How often ought those boilers to be taken apart and cleaned to prevent dirt accumulating on the crown sheets?

A. That I couldn't say.

Q. Once a year?

A. Well, it is according to what they are used for.

Q. Suppose they were used all the time, ought they not to be taken apart once a year?

A. It is somewhat according to the water.

Q. On canals?

A. Oh my, yes.

Q. Twice a season?

A. They do generally. They ought to be every trip.

Q. Don't you usually do so?

A. They should be washed out every trip.

Q. By that you mean to say the crown sheets should be kept clean?

A. Yes, sir; generally provision is made for that purpose.

Q. Are you able to state yourself what the condition of that boiler was on the 28th day of May, 1883, when you sent a man to repair it?

A. Could I state about the condition?

Q. What the condition of it was?

A. No, sir; I could not.

Q. Suppose you were told that within three weeks afterward $283 was spent in putting that boiler in repair.

A. Three weeks previous to that?

Q. No; after it. What would that indicate?

122 A. That would indicate that she was not in very good shape.

Q. All you did was to insert a small tube in the tubes, wasn't it?

A. We rolled about all the tubes that was in the boiler in the furnace head and made them tight.

Q. How is that done?

A. By a roll tool.

Q. By inserting a rolling tool?

A. Yes, sir.

Q. All the instructions you got were to beat the tubes?

A. That is what it was generally.

Q. Now, what is the cause of the tube leaking? If these tubes leaked what do you think was the cause of the leaking?

A. That I couldn't say. There must have been some cause for it.

Q. Was it an accumulation of dirt?

A. Low water.

Q. Low water where?

A. Low water on her crown sheet; no water below the crown sheet.

Q. In order to keep it above the crown sheets you only needed a hand to tend the engine?

A. I suppose so.

Q. What kind of water is this canal water for engines?

A. It is pretty roily.

Q. What effect does it have?

A. It accumulates mud in the boiler and there is no protection.

Q. Now, the canal water, you say, is roily. What effect does that have on the engine?

A. It is roily.

Q. What effect does that roily water have on the crown sheets?

A. It fills the boiler with that sediment.

Q. It makes mud on the crown sheets?

A. Yes, sir.

Q. Now, when dirt has accumulated on the crown sheets isn't the rolling and beating of the tubes merely temporary in its effect?

A. It is a temporary arrangement.

Q. A mere temporary arrangement, is it?

A. Yes, sir.

Q. And unless the dirt is removed such repairs are of very little consequence, aren't they?

A. Sometimes they get on very well.

Q. Then at other times?

A. Can't tell.

123 Q. There is risk, is there, always of breaking down at any time unless you remove the dirt?

A. A dirty boiler is not reliable.

Q. Now, if such an engine as hers should blow off would the safety-valve be at No. 25?

A. I don't know anything about that.

Q. Don't know anything about that?

A. No, sir.

Q. Suppose the safety-valve was set at sixty or seventy on such a boat, would she blow off at 25?

A. If the weight was off it would blow off.

Q. Now, if a safety-valve was set at 60 or 70 pounds, do you see how she could blow off at 25 pounds?

A. No; I don't see how she could do that.

Q. You don't see how she could do that?

A. No, sir.

Q. Of course such work as you did you wouldn't guarantee how long it would last; it might last ten minutes and it might last ten years?

A. That is the idea. A man comes over and gives us a job to do and we have to do it as we are told. If we make a job ourselves we are going to make a big bill. We generally do as we are told.

Q. You would not guarantee such a job as you did there?

A. No.

Redirect examination by Mr. Hyland:

Q. Do you know what kind of an engine this was; whether it was a single condensing engine?

A. I believe they are all condensing engines.

Q. Do you know whether this was a condensing engine?

A. I know it was an upright engine.

Q. Do you know how often a condensing engine—the boiler of a condensing engine—must be supplied with water?

A. That I don't know.

Q. You don't know anything about that?

A. I do not.

Q. Do you know that when you got through your job the boiler was tight?

A. Yes, sir.

By consent of counsel the witness signed his name to the stenographer's notes.

124 Gordon W. Hall, called on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. Hyland:

Q. Where do you reside?

A. At Lockport, this State.

Q. What is your business?

A. I am an engine-builder and a boiler-builder.

Q. Did you build the boiler on the canal-boat "Sydney?"

A. Yes, sir.

Q. What kind of a boiler was that?

A. It is what is known as a vertical boiler.

Q. That is known in common parlance as an upright boiler, isn't it?

A. Yes, sir.

Q. When was that boiler built?

A. It was built in 1879, I think.

Q. How long would such a boiler as that last with good care?

A. Well, there is some of them already in use that have lasted ten years; how much longer they will last I can't tell.

Q. That is as long as they have lasted?

A. Yes, sir; about that time.

Q. What kind of a boiler was this as to kind of its class that you built?

A. It is a regular merchantable boiler, the same as they all are of that class.

Q. Is she the same as any you have built of that class?

A. The same thing.

Q. In the spring of 1883 did you examine that boiler about the 19th or 20th of May while the "Sydney" was on a trip from Buffalo to New York?

A. I can't recollect the date, but it was the time she went down with the first load in the spring.

Q. Is that the load this accident happened with in the spring?

A. It was before this accident happened.

Q. Was that boiler cleaned at that time?

A. He blew it off and took out the hand-holes and washed it out with our hose. We have a water power there.

Q. Washed it out there?

A. Yes, sir.

125 Q. After it was put together again did you examine it?

A. I saw them get up steam. The boiler was apparently in the usual order.

Q. Did they draw off the fire there—was the fire drawn?

A. Yes, sir.

Q. And they used your hose to clean out the boiler?

A. Yes.

Q. And the boiler, you say, was in good order?

A. I wish to be understood that some seventy-five people have these steam canal-boats, and they stop there for that purpose, and this boiler appeared to be about the same as any of them in ordinary running order.

Q. Was the boiler tight when it left after they got up steam?

A. Yes, sir.

Cross-examination by Mr. McCarthy:

Q. What is your firm in Lockport?

A. Gordon W. Hall.

Q. Have you a partner?

A. No, sir.

Q. You put this boiler and engine in the "Sydney" in repair in the month of June, 1883?

A. Yes, sir.

Q. Do you remember what the amount of your bill was?

A. I think the boiler was a contract price.

Q. I want to know the amount of your bill.

A. $125.

Q. Wasn't it more?

A. No, sir; not on the repairs on the boiler. They might have been otherwise.

Q. On the engine and boiler how much? What was the amount of your bill for repairs on the boiler and engine?

A. I think it was somewhat over $200.

Q. What day in June was that?

A. I think it was finished near the first of July.

Q. Do you know when she got there in June for these repairs?

A. I couldn't remember; it is so long ago.

Q. Have you got a yard there?

A. I have a machine shop and foundry.

Q. Do you know how long she remained at your machine shop undergoing these repairs?

A. I should think, by the amount of work done, it was at least two weeks.

126 Q. I wish you to tell just what you did on that boiler and engine for that sum of $200.

A. I took the boiler out of the boat and took the tubes out, and I think I put in a new fire-box, but I don't remember distinctly. I might have been able to tell if I thought I was going to be asked the question. I think I took the tubes out and did what we call overhauling the boiler.

Q. You intended to make a good job of it, then?

A. I couldn't tell you whether I put in a new fire-box or not.

Q. Can't you give us any idea beyond that of the work you actually did on that boiler and engine?

A. I couldn't give you the work on the engine, because——

Q. Does the amount of your bill indicate that the repairs were thorough and extensive?

A. The repairs on both was complete, because I took it at contract prices.

Q. Does that indicate that the repairs were extensive?

A. It was what I call—what we have in our boatmen parlance—overhauling the boiler; took the tubes out and replaced them in the boiler.

Q. Did you oversee that work yourself?

A. Yes, sir; I was there.

Q. Wasn't it an extensive job for such kind of work?

A. I hardly know how to answer. There was nothing new, unless it was a fire-box.

Q. Did you not find the boiler dirty?

A. There was some grease and sediment collected on the inside of the sheets. That is always the case.

Q. Now, when you say it was collected on the inside of the sheets, you mean at that place where it can be taken away only when the boiler is taken apart—can't reach it in any other way?

A. It is a simple matter to scrape the boiler out without taking it apart.

Q. Wasn't this dirt and sediment collected under the crown sheets?

A. Some there and some in the tubes and some on the inside?

Q. Now, dirt and sediment collected on the inside of the crown sheets cannot be removed unless the boiler is taken apart, can it?

127 A. Yes; it can be removed by scraping and with washing by water and hose to a certain extent, so that the boiler will last for several years, even after the tubes commence to leak.

Q. Do you say that sediment and dirt which have collected on the crown sheets of a steam-boiler can be safely and cleanly removed unless the boiler is taken apart; the flues of the boiler?

A. You mean on the top?

Q. Yes; on the flue. I mean where it comes between the upper and lower sheet.

A. To do a real thorough job, the boiler has to be taken apart.

Q. Now, when dirt or sediment or grease collects on the crown sheets of a boiler it is liable to leak, isn't it?

A. After it accumulates to a certain extent.

Q. Is it liable to leak? Answer my question.

A. I shall have to answer it as I understand it.

Q. Won't you answer my question yes or no?

Mr. Hyland: He can't answer it yes or no.

Q. I want you to answer my question.

A. Ask it again, and if it is possible to answer it I shall do so.

Q. Is it liable to leak when sediment and grease have collected on the crown sheet?

A. I shall have to say just as I did before: without some qualifications in that question I cannot answer it yes or no. If you will give me the thickness or amount of what you want me to answer to I will answer no.

Q. The question is, Does dirt collected on the crown sheets of a boiler tend to produce leakage? Yes or no.

A. I can't say yes or no to that to do justice to the case. The next day after you start a new boiler, after she is run the next twenty-four hours, she has got grease on her crown sheets, and she may run twenty-five years and not leak, but when it gets two or three inches thick and the iron gets heated to a white heat——

Q. The question is, Is not sediment and grease collected on the crown sheet of a boiler a predisposing cause of leakage?

A. I will answer yes.

Q. Now, the Erie canal water is roily, is it not?

A. No more roily than in the stream water. It is fed by creeks and rivers.

Q. Is it more dirty than ordinary water?

128 A. Well, some sediment from the horse boats may be thrown into it; ordinarily about the same as river water.

Q. How often ought a boiler to be thoroughly cleaned which has been used in navigating the Erie canal?

A. I want you to understand that overhauling a boiler is to take it apart. It is a big job to take the tubes all out. That is generally done in three to five years. That is according to how it has been taken care of.

Q. How often ought it to be thoroughly overhauled and cleaned?

A. Whenever the sediment gets too thick, so that it causes it to leak.

Q. As soon as there is any leakage; that is an indication of trouble, usually?

A. Yes; usually.

Q. And you ought to exercise very careful supervision; is that so?

A. Yes, sir.

Q. Do you remember a man by the name of Samuel G. Smith having called upon you after these repairs were made and had a conversation with you in Lockport about them?

A. I don't remember such a man.

Q. A man from New York?

A. I don't know that I ever knew such a man.

Q. Didn't he call upon you and have a talk with you about this boiler after you repaired it?

A. I don't remember anything about it. I don't know that any such man ever talked with me.

Q. Look at that bill. That was drawn by your daughter, wasn't it (handing witness paper)?

A. No, sir; by a lady who keeps my books.

Q. Don't you remember that you gave that bill to a man from New York who called at your place?

A. No, sir; I have no recollection of it whatever.

Said paper is marked Exhibit B for identification of this date.

Q. At or about the time that this bill was given to him (Smith) or
anybody, do you remember a conversation about the condition
129 of that boiler before you repaired it?

A. I do not. I don't know that any man ever spoke to me about it.

Q. Did you not tell him that when you took the boiler apart you found it was very dirty and very greasy?

A. I might have told him so; yes, sir.

Q. You might have said so?

A. Yes; that is generally the case.

Q. You might have said that?

A. Yes; I might have said that. I have no remembrance of saying that.

Q. You don't deny that you might have said it?

A. No.

Q. If you said it it was true, wasn't it?

A. I try to tell the truth; yes, sir.

Q. Now, what day was it in May that this boat came down the canal first?

A. I couldn't tell you. It was soon after the opening of navigation.

Q. What day was she at your shop?

A. I couldn't tell without reference to the books. If I did any work the date is on them.

Q. You have not any evidence here to show that you did any work on it? Did you do anything at that time when she came down the canal for which you made a charge against her or her owners?

A. My impression is that I did.

Q. Did you?

A. I can't say yes or no, because there was so many. I can't tell.

Q. Did you personally oversee any work that was done to her on that occasion? I mean the occasion when she came down the canal.

A. I know she stopped there and know she cleaned out her boilers.

Q. Did you supervise it personally?

A. I don't know.

Q. Did you supervise the work yourself personally?

A. Yes.

Q. What did you yourself do?

A. I told Mr. Wager how to do it.

Q. What did you yourself do about it generally?

A. I stood by and see them take the hose and see them couple it onto our water works and see him put it through the hand-holes of the boilers.

Q. What else?

A. I don't remember anything else.

130 Q. How long a time did that operation consume?

A. Well, anywhere from two to three hours.

Q. Will you swear that it was more than one hour?

A. I didn't stay there all the time. I had other business to attend to. I don't think I did.

Q. Who assisted Wager?

A. Who assisted Wager?

Q. Yes.

A. The men on the boat.

Q. Did you see anybody assist him?

A. I couldn't give any names, but the men on the boat, I suppose.

Q. Did you yourself at that time test the boiler?

A. I went in and looked into it.

Q. Did you test it? Aren't you engineer enough to know what that word means?

A. I didn't put the cold-water pressure on.

Q. Did you or did you not test the boiler at that time?

A. I see steam got up on it.

Q. Did you or did you not test the boiler at that time?

A. I will call that a test, getting up a steam pressure.

Q. Did you or did you not test the boiler at that time?

A. I call that a test.

Q. Answer my question.

The COMMISSIONER: If you know of any other test, say so, and if you do not, say so. You can say whether that test is the only test. You can state what the facts are.

The WITNESS: One way is to get up a pressure——

The COMMISSIONER: You can go on and describe what you understood the word test to mean and say whether you tested it in that way.

The WITNESS: Sometimes we get up a cold-water pressure and at other times we examine the boiler thoroughly and get up steam and see whether the boiler stands the pressure without leaking.
131 We call that a steam test. That is all that was done. We got up a steam pressure and see that the boiler was all right.

Q. Who got up the steam pressure?

A. Mr. Wager and his man.

Q. That was just before they started?

A. Yes, sir.

Q. Before they got under way?

A. Yes, sir.

Q. That is what you call a test?

A. Just what I said previously.

Q. That is what you call a test?

A. I examined the boiler over.

Q. That is what you call making a test?

A. That is what I told you.

Q. That is the sort of test that is made every time a steamboat gets under way, is it not?

A. Get up steam every time we get under way; yes, sir.

Q. That is the sort of test that is made every time that a steamer leaves a wharf?

A. Every time they get up steam they ought to have a man go and examine the boiler all over and see that everything is right.

Q. That day you got up steam what did you do?

A. I see that everything was all right.

Q. Did you examine manhole?

A. There was no manholes; there was hand-holes.

Q. Did you reach in?

A. Yes, sir.

Q. What else did you do?

A. I felt about the tubes to see what the condition of them were.

Q. What else did you do?

A. Didn't do anything.

Q. What bill did you render for all that service?

A. I never rendered any bill for such a service.

Q. What was it?

A. Gratis.

Q. Do you know the man who owned her at that time?

A. I know the man who was the owner. Mr. Wager owned her, I suppose.

Q. When before that time—I mean that time in May, 1883—had you overhauled and repaired this boiler?

A. I think it was just about a year before.

Q. Do you know?

A. Well, I am pretty certain it was just about a year before.

Q. What had you done to her?

132 A. I took the boiler out and took the tubes all out and put them back in again.

Q. Where?

A. Right at the same place.

Q. What was the amount of your bill?

A. $125.

Q. What the year before?

A. Yes, sir.

Q. The same as it was this time?

A. Yes, sir.

Q. Will you swear it was?

A. Yes, sir.

Q. Will you swear that at any time in 1882 you took that boiler apart and did repairs for which you made out a bill for $125?

A. It was done through the winter. The boat laid there through the winter.

Q. Will you swear that in the winter of 1882 you took that boiler out of the boat and put it in repair and rendered a bill for $125?

A. I can't swear to it, because I don't remember all about that.

Q. Will you swear you did?

A. I swear I fixed it.

Q. Will you swear you took the boiler out of that boat and repaired it?

A. Yes, sir.

Q. At whose request?

A. At the request of Mr. Henry Lummy, the man who owned it.

Q. Where did he live?

A. He lived at Havana, in this State.

Q. What time in the winter of 1882 was it?

A. My impression is that it was in April. I don't mean April. It was a month before the canal opened.

Q. You are positive about it?

A. Yes, sir. The boat was finished before canalling, so that everything was done.

Q. You are positive you took the boiler out?

A. Yes, sir.

Q. Took the boiler apart?

A. Took the boiler out and took the tubes out and done the same job that I did for Mr. Wager.

Q. In June, 1883?

A. Yes, sir. All I remember about the date is it is on my book. I notice on the 5th day of July——

Q. How do you explain her leaking on this very first trip she made at Schenectady. How do you explain that?

A. I couldn't explain it, because I wasn't there.

Q. Do you think it was an inevitable accident?

A. There is more than one way to make a boiler leak.

133 Q. How do you suppose this boiler got to leaking so soon after the application of hose and water?

A. Sometimes a little too much oil fed through the engine will start the tubes and the boiler to leaking.

Q. Does letting the water get low in the boiler do it?

A. Yes; that will do it.

A. Does the letting of the fires get low have anything to do with it?

A. No; letting the fire get low does not have anything to do with it unless the surfaces are heated to a white heat and there is sudden contraction.

Q. It is pretty important to keep the water pretty well up and to keep the fires steadily going?

A. Not if there is anything to prevent the iron getting heated to a white heat.

Q. Small boilers require more care, don't they?

A. Any boiler requires care.

Q. Don't those small boilers—aren't they particularly liable to get out of gear?

A. No, sir; not so much so as large boilers. Statistics will show——

Q. Don't you think that somebody ought to be looking after them all the time?

A. Yes; that is the case with any boiler.

Q. Is a man stationed in the wheel-house guiding the motion of the boat a proper person to be looking after the boiler?

A. I think that is just the thing. I have followed it for years myself.

Q. Do you think that is just the thing?

A. Yes, sir; the water-cocks and everything is arranged at the side, and he can handle the engine with his hand and would be more likely to look after it than he would be if he was lying asleep in the engine-room somewhere.

Q. What do you think a fireman has to do in such a case?

A. The fireman in such a case fills the boiler once in six hours.

Q. You don't need anybody to manage both boats except the man at the wheel?

A. One other man. Keep him right there to be ready to do anything that wants to be done.

134 Q. That bill that has been marked here Exhibit B for identification—did that bill come from your shop?

A. Yes, sir.

Q. What is the ordinary pressure on this engine boiler?

A. Seventy pounds.

Q. On how low a pressure would she steer?

A. Do very well with 40 pounds.

Q. Wouldn't she steer with any lower pressure?

A. She would not manage very well.

Q. Wouldn't she steer with a lower pressure?

A. In a calm place less than 40 pounds would keep her under way.

Q. How low could you get to steer her?

A. I think the limit would be 35 pounds.

Q. Couldn't steer her below 35 pounds?

A. She wouldn't have headway enough.

Q. You say she couldn't steer if she got below 35 pounds?

A. If she was single she might; if she was with another boat she could not. A single boat will have more headway with the same propelling power than two boats would have.

Q. Suppose she is going with an ebb tide, how low would she have to get before she is utterly helpless?

A. Couldn't do much with her at 35 pounds.

Q. Couldn't do anything with her below that, could you?

A. I don't think you could.

Q. What could be done after she got as low as 25 pounds? She was perfectly helpless, wasn't she?

A. She wouldn't do much.

Q. Could you do anything with her at 25 pounds?

A. She was perfectly helpless; 25 pounds would possibly turn the wheel around.

Q. Could you navigate with her any distance?

A. No.

Q. Couldn't do much hauling with her?

A. With 25 pounds?

Q. Yes.

A. She wouldn't pull much. These are condensing engines, and with a good vacuum they will turn the wheel a little with 25 pounds.

Q. You think she is practically useless when the pressure gets so low as that?

135 A. She wouldn't do much. Of course, if the wheel turned at all she would do a little all the time.

Q. Suppose this boat had 25 pounds pressure on going down the river with the ebb tide, could you steer her so as to keep her off the rocks on either side?

A. That is another conditional question. If she was in calm water, without any tendency to drift, you might possibly keep her headed in the direction he wanted to go, but if you were drifting she would not have any power to take her anywheres out of the way of anything she was drifting onto.

Q. May this fall in the pressure be instantaneous from seventy to twenty-five pounds?

A. No; it wouldn't be instantaneous.

Q. If produced by a leaky flue, for example, how long a time would it take?

A. There is several conditions. If the water ran down into the fire it would not take but a very short time to take the water to put the fire out. If the steam was blowing in the fire it would do almost the same thing. If the steam blew up you might be able to keep it up longer.

Q. How long?

A. Perhaps an hour; but if she blew into the fire and put the fire out it would run the steam down in ten minutes at the outside, because there is not much of a reservoir under these boilers.

Q. Can you reverse with the pressure at twenty-five pounds?

A. Yes; I think I could.

Q. Could you not back against the tide?

A. No; I don't think she would against any tide. I think the tide would carry her on headways.

Q. Could she resist a three-mile tide?

A. No, sir.

Q. A two-mile tide?

A. No, sir; nor a one-mile tide.

Q. Nor a one-mile tide?

A. No, sir; twenty-five pounds would not put her a mile either way.

Q. Would she blow off after she had reached twenty-five?

A. She would not unless the weight were taken off the lever or raised up.

Q. Would she then?

A. Yes; blow off as long as any steam was in the boiler, if the safety-valve was raised.

136 Q. How could that be done?

A. Taking hold of the lever and raising it up.

Q. Would she exhaust? Below what limit would she not exhaust?

A. I don't understand you.

Q. Does exhausting and blowing off mean the same thing?

A. Exhausting is exhausting from the engine—exhausting the steam from the cylinder. In canal parlance we mean when the steam would be exhausted from the boiler it would be exhausted when there is none there. If the safety-valve was raised it would all blow off and no steam would be left.

Q. How long would that take?

A. That would depend upon how high the pressure stood.

Q. Twenty-five pounds?

A. I think it would be blown off in ten minutes.

Q. By hoisting the safety-valve?

A. Yes.

Q. Would it make much noise?

A. Yes; make a noise.

Q. Suppose there were sixty pounds pressure there?

A. It would take longer to blow it off and make more noise.

Q. How long would it take then?

A. Twenty minutes.

Q. Not more than twenty minutes?

A. No, no more than that. Perhaps less.

Q. Ordinarily, how far could you hear blowing off when the pressure is at twenty-five pounds?

A. I should think half a mile.

Q. Twenty pounds the same answer?

A. No, I don't think it would.

Q. Suppose it got down to twenty pounds?

A. Well, it could be heard a quarter of a mile at twenty pounds.

Q. How long would it take to blow off?

A. At twenty pounds? Well, from six to ten minutes. I never tried the experiment, but I have blown it off a great many times. It wouldn't take a great while.

Redirect examination by Mr. HYLAND:

Q. Mr. Hall are you the inventor of this boiler and engine?

A. Yes, sir.

137 Q. Is the intention of making this boiler and engine so that the man at the wheel can run it alone without any assistance?

A. That was the original design.

Q. And how is the boiler supplied with water?

A. The condensing engine; it turns through the boiler into the water and back inside the boiler again.

Q. How often has the boiler to be supplied with water?

A. If it is in good condition, once in six hours.

Q. Once in six hours it requires water?

A. A little water.

Q. How often is it required to oil it?

A. Oil the engine?

Q. Yes.

A. It was arranged so that it was to be oiled once in six hours.

Q. How often is the fire to be supplied?

A. Once in six hours, except the shaking. The shaker is in the wheelman's hands.

Q. The wheelman does all that?

A. Yes, sir.

Q. So that the engine and boiler is so arranged that you can put in a supply of oil, water, and fuel that will last six hours?

A. Yes, sir.

Q. And the man at the wheel of the boat can handle the levers and determine the condition of the working of the engine from where he stands?

A. Yes, sir.

Q. And it is not necessary to have another man with him during that time, except to obey his orders and follow his directions?

A. Yes, sir.

Q. And do these engines and the boilers work reasonably well?

A. Yes; they are the only successful ones running.

Q. The only successful ones running on the Erie canal to-day?

A. Yes, sir.

Recross-examination by Mr. McCarthy:

Q. How old was that boat or engine and boiler?

A. They were built in the spring of 1879.

Q. Sure?

A. I am pretty sure; I built another one at the same time.

By Mr. Hyland:

138 Q. Do you know when the engine and boiler was last inspected by the inspector before this collision?

A. Inspected last spring.

By Mr. McCarthy:

Q. Do you know?

A. I know that was the time it was inspected.

Q. Do you know the time she was inspected?

A. All I know is that Mr. Wager came down——

Objected to.

Q. You didn't build the boat?

A. I didn't build the hull; I built the machinery. Mr. W. C. Gillespie built the hull. They were partners in building steamboats.

The paper marked for identification by counsel for libellant handed to witness, and witness asked to explain the items and state what the repairs were which were made to each item.

Mr. McCarthy: Objected to because the bill is not in evidence and I do not intend to offer it. I shall not object to the claimant's proctor putting it in evidence if he wishes to.

By consent of counsel the witness signs his name to the stenographer's notes.

Mr. McCarthy requested the witness to send to him his bill for the repairs that were made to this boat in the winter of 1882, and, annexed to it, an affidavit certifying that it was an accurate bill for those repairs.

The witness promised that he would comply with counsel's request.

William Riley, called on behalf of claimant, being duly sworn, testifies as follows:

Direct examination by Mr. Hyland:

Q. What is your business?

A. Boating.

Q. How long have you been boating?

A. Fifteen years.

139 Q. How old are you?

A. Thirty years old the sixteenth day of this month.

Q. Were you a hand on the steam canal-boat "Sydney" at the time of the accident, in May, 1883?

A. Yes, sir.

Q. In what capacity were you working there?

A. Fireman.

Q. Do you remember about when the "Sydney" left Buffalo?

A. No, sir; I don't remember the date.

Q. Do you remember whether when she stopped at Lockport — had her boiler cleaned?

A. Yes; she did.

Q. Did you help clean it?

A. I did; yes.

Q. Was it thoroughly cleaned?

Objected to as leading and as calling for a conclusion of the witness.

A. I think it was.

Q. What happened after you left Lockport?

A. She commenced leaking again.

Q. Where?

A. Schenectady.

Q. At Schenectady?

A. Yes, sir.

Q. Where did she leak there?

A. Very little; in the fire.

Q. What was done then?

A. We run her to Troy.

Q. Then what was done?

A. Got her fixed.

Q. Then what did you do?

—. Came down the river.

Q. What trip was this—the fore part or after?

A. The fore part.

Q. Did anything happen up to the time just before running on the rocks?

A. No, sir.

Q. Were you on duty then?

A. Yes, sir; I was.

Q. What was you doing?

A. I was walking around the decks attending to my duty.

Q. What were your duties as fireman?

A. Oil the engine, keep coal on the fire, and water her.

Q. Oiling the engine, keeping coal in the fire, and water in the boiler?

A. That is all, and water in the boiler.

Q. When were you in the engine-room last before the steam escaped from the boiler?

A. Five minutes.

140 Q. What were you doing there that five minutes before?

A. Looking at the engine.

Q. Looking at your engine?

A. Yes.

Q. Did you do anything?

A. I did.

Q. What?

A. Put oil on her.

Q. How was the fire then?

A. I didn't look.

Q. What did you do then? What called your attention first to this?

A. I went on deck.

Q. What did you do then?

A. I looked around there and went over to the cabin.

Q. Over to what cabin?

A. Forward cabin—middle cabin.

Q. How much forward of the wheel-house was that?

A. Not over eight feet.

Q. What called your attention to this first—to the steam escaping?

A. It came out of the stack.

Q. Then what did you do?

A. I run down in the fire-hole.

Q. And what did you discover there?

A. Tubes leaking on the fire.

Q. Just state what happened, as far as you know, from then on.

A. We put the fire out; that is all.

Q. Put the fire out?

A. Very near out; yes.

Q. Did the pressure of the steam drop?

A. Yes, sir.

Q. How much?
A. Twenty pounds.
Q. Down to 20 pounds?
A. Yes, sir.
Q. By the indicator?
A. Yes, sir.
Q. How much steam were you carrying?
A. 70—65 to 70.
Q. And it dropped down to 20 pounds?
A. Yes.
Q. How soon after that before the vessel struck the rock?
A. Not to exceed ten minutes.
Q. Do you know how the wind blew?
A. No, sir; I don't.
Q. Do you know anything about the position of the vessel in the stream there?
A. No, sir.
Q. You paid no attention to that?
A. No, sir; I paid no attention.
Q. What was done at all when the boat struck the rock?
A. I couldn't say; I was in the fire-hole.
141 Q. What was done with the "Sydney" after that—after the "Worden" had struck the rock?
A. I couldn't say what they did do after they got us uncoupled?
Q. What did they do then?
A. The tide swung her around in the channel on the east side of the island.
Q. What did you do with the "Sydney"? Did you anchor her?
A. Yes, sir.
Q. Then what did you do?
A. We tried to fix her tubes.
Q. How did you try to fix the tubes?
A. Plugged them.
Q. Who plugged them?
A. Mr. Wager and myself.
Q. How long did it take to plug them?
A. Two hours.
Q. And what time did you get through plugging the tubes?
A. About four o'clock in the morning.
Q. How did you plug the tubes?
A. With wooden plugs.
Q. What do you mean—plugging both ends of the tubes?
A. Plugging both ends.
Q. What did you do at four o'clock?
A. Began to get up steam.
Q. Did you get up steam?
A. We did.
Q. How much?
A. 35 pounds.
Q. Then what did you do?
A. Then we started for New York.

Q. Where did you go from?
A. Hyde Park.
Q. What did you do there?
A. I don't know what we done there.
Q. How did you get from Hyde Park to New York?
A. She towed along with a steamboat.
Q. What boat?
A. The "Saturn."
Q. How far from Hyde Park was Esopus Island where you grounded?
A. Three miles, we call it.
Q. You came on to New York?
A. Yes.
Q. How did you fasten to the "Saturn"?
A. Alongside.
Q. Did she take any tows?
A. Yes; we had a consort.
Q. Where was she?
A. The consort was ahead and we were alongside.
142 Q. And you came to New York that way?
A. Yes, sir.
Q. And how much steam were you able to get up all that time?
A. From 20 to 25 pounds.
Q. Was that as much as you could get up?
A. That was as much as we could get up.
Q. Did you go to sleep any time that night before this collision happened?
A. No, sir.
Q. Were you on duty constantly?
A. Yes.

Cross-examination by Mr. McCarthy:

Q. Did you get the "Sydney" repaired after you came to New York?
A. Got her tubes rolled; yes, sir, in Brooklyn.
Q. Tubes rolled?
A. Yes.
Q. At whose yard?
A. I don't know the man's name.
Q. On what day?
A. I couldn't state the day.
Q. For how long a time was he engaged in rolling her tubes?
A. I didn't count the number of hours.
Q. Was he more than one day?
A. No, sir; he was not more than one day.
Q. Was there more than one man engaged?
A. That was all.
Q. Who employed him?
A. The captain.
Q. Wager?
A. Yes, Wager.

Q. He would be apt to know his name. Then you went back to Buffalo?

A. Yes, sir; we went back to Buffalo.

Q. Did you take a load up with you?

A. Yes, sir; we did.

Q. What was it?

A. Coal.

Q. Did you carry the usual quantity of steam going back to Buffalo?

A. No; we did not.

Q. How big a load did you carry?

A. 100 tons.

Q. Did you have a consort with you?

A. We did; yes.

Q. What was she?

A. She had 100 tons.

Q. What was her name?

A. "Jessie Peterson."

Q. Did you get her repaired in Buffalo?

A. We got her repaired in Lockport.

143 Q. At the shop of Mr. Hall?

A. Mr. Gordon W. Hall's shop.

Q. What was the size of these wooden plugs that you used at Esopus Island?

A. 2½ inches.

Q. 2½ inches what way?

A. In thickness.

Q. In thickness?

A. Yes, sir—through.

Q. How long were they?

A. 4 inches long.

Q. How wide?

A. 2½ inches.

Q. Where did you get those plugs?

A. Cut them out of wood.

Q. What wood?

A. Pine wood.

Q. Where did he get the wood?

A. I couldn't say where he got the wood. I don't think he stole it.

Q. Don't be facetious, William. You don't know where he got the wood?

A. No, sir.

Q. Who did the whittling?

—. Mr. Wager.

Q. How many did you whittle?

A. Two.

Q. Only two?

A. That is all.

Q. Did you drive these plugs into holes that existed there?

A. Yes, sir.

Q. Through which you saw the water leaking?
A. Yes, sir.
Q. Did you drive them from outside in, or from inside outwards?
A. Drove them from outside in.
Q. You say you drove them at the ends?
A. Yes, sir.
Q. What ends?
A. The ends of the tubes—the upper and lower ends.
Q. That is a vertical tube?
A. Yes.
Q. Just like a stove-pipe?
A. Just exactly; just the same as one length of stove-pipe, exactly.
Q. Whereabouts did you drive this?
A. In the combustible chamber.
Q. Where did you drive it?
A. In the crown sheet in the fire-box.
Q. What had caused these holes at the end of the boiler?
A. That is a question I can't answer.
Q. You cannot answer that?
A. No, I can't.
Q. Why didn't you see these holes there before?
A. Because they were the holes in the tubes. The water comes around the tubes.
144 Q. Why hadn't you observed the holes where they were where you drove those wooden plugs before?
A. I had seen them lots of times.
Q. You had seen them before?
A. Yes, sir; the holes in the ends of the tubes.
Q. Why didn't you drive plugs there before?
A. No necessity for it.
Q. Was there a necessity for your doing it when you did it?
A. Yes; there was water in the boiler—to keep water in the boiler to try to get steam again.
Q. What were you doing in the cabin when you heard this?
A. I stepped in there.
Q. What were you doing there?
A. I could not state exactly what I was doing.
Q. What did you go in there for?
A. Oh, maybe I went to look around, or get a chew of tobacco, or something of that kind.
Q. Maybe so?
A. Yes.
Q. Did you hear Captain Wager call to you?
A. I did.
Q. And then you came out?
A. I did, immediately.
Q. Had you been lying down?
A. No, sir.
Q. Did you have a light in the cabin?
A. No, sir.

Q. Was anybody else in there but you?

A. That was all—me—nobody else.

Q. How long had the boiler been leaking before the steam began to escape?

A. It had not leaked before the steam escaped?

Q. How did you know?

A. Because we would have seen it in the stack; we would have seen steam coming from the stack.

Q. Don't you think it leaked before that time?

A. No, sir.

Q Where were you when it leaked up near Schenectady?

A. I was on the boat.

Q. Whereabouts?

A. On the deck of it.

Q. Did you witness that?

A. Yes; I did.

Q. Did it leak in the same place?

A. I could not say.

Q. Why not?

145 A. Because we didn't pull the fire to find out. We tugged along with it the best way we could and carried what steam we could.

Q. Did it leak worse when you were up at Schenectady than it did when you were down at Esopus?

A. No, sir; it did not leak as bad.

Q. How far did the steam fall when it leaked at Schenectady?

A. Fell thirty-five pounds.

Q. It fell thirty-five pounds?

A. It fell down to thirty-five pounds.

Q. When did you see the steam was up to seventy pounds before this collision at the rocks?

A. When I was on deck and looked at the boiler last—at the gauge.

Q. What time was that?

A. That was twenty minutes before that.

Q. When did you see that it got to twenty?

A. Just before she struck the rocks.

Q. How long before she struck the rocks?

A. Not to exceed ten minutes.

Q. As much as that?

A. Not to exceed ten minutes.

Q. Are you sure it was as much as ten minutes?

A. Yes, sir; I am sure; between six and ten; yes, sir.

Q. So you were drifting all that time?

A. I believe they were drifting. I didn't stop to look; that was not my business.

Q. From the time when you saw the steam had fallen to twenty pounds up to the time when the collision occurred there were six or ten minutes elapsed?

A. Yes; six or ten.

Q. You are sure?

A. Yes, sir; I am positive.

Q. Do you understand my question?

A. Yes, sir.

Q. Do you want me to repeat the question?

A. No, sir.

Q. How old are you, William?

A. Thirty years old the sixteenth day of this month.

Q. You look young for that age. Had you ever been on a steam canal-boat before?

A. Yes, sir.

Q. What one?

A. The "Bennington."

Q. Before this collision?

A. Yes.

146 Q. What had you been doing on the "Bennington?"

A. Firing; the same.

Q. Did you know a man on this boat of yours by the name of Hibbard?

A. No, sir.

Q. You don't know Frank Hibbard?

A. No, sir.

Q. Where were the other two men?

A. Asleep in the "Worden."

Q. They didn't get up at all?

A. Not till Wager called them.

Q. Were they up before the collision?

A. No, sir.

Q. You don't know anything about the tides, then?

A. No, sir.

Q. Do you know whether there was much wind?

A. There was a good breeze blowing—a stiff gale.

Q. Which way did it come from?

A. I couldn't tell.

Q. You know it was a stiff gale?

A. Yes, a good, stiff gale of wind.

Q. Do you know which way the tide was?

A. No, sir; I don't.

Q. You don't know which way the current set?

A. No, sir.

Q. How far do you think you were away from the rocks when the steam began to fall?

A. I couldn't say.

Q. No idea?

A. No, sir.

Q. Do you know which channel you were in?

A. No, sir.

Q. Did you try to haul the "Worden" off the rocks?

A. I couldn't say whether they did or not.

Q. Did you have any truble with your engine between Lockport and Schenectady?

A. No, sir.

Q. None at all?

A. None at all.

Q. Did you have any trouble between New York and Lockport on your way back?

A. We did with the boiler—some trouble.

Q. Some leakage?

A. Yes.

Q. You think she needed to be taken apart and cleaned?

A. I say she wanted fixing.

Q. Do you say she needed to be taken apart and cleaned?

147 A. I don't know about apart. I couldn't say whether she needed to be taken apart. I know she needed stopping the leaking.

Q. She needed thorough cleaning, did she?

A. I couldn't vouch for that part—thorough cleaning.

Q. Do you know what was done to her at Lockport in July, 1883?

A. Yes, sir.

Q. Was she taken apart?

A. Mr. Hall took her tubes out.

Q. Was she taken apart?

A. Yes, sir; she was taken apart.

Q. Her boiler?

A. Yes, sir.

Q. And cleaned?

A. Yes, sir.

Q. Between the crown sheets?

A. Yes, sir.

Q. On the crown sheets?

A. Yes, sir.

Q. Wasn't there dirt and grease found on the crown sheets?

A. There was.

Q. How much?

A. I couldn't say how much.

Q. Did you remain in her that season?

A. I did; that season.

Q. Did you have any more trouble with her?

A. I remained in her till we got back here.

Q. Did you remain in her through the summer?

A. Not the whole of the summer; no, sir.

Q. Are you on a steam canal-boat now?

A. Yes, sir.

Q. What one?

A. The "Clarke."

Q. Did she blow off after the collision?

A. No, sir.

Q. Or exhaust?

A. No, sir.

Q. Was her safety-valve lifted?

A. Yes; it was.

Q. But she did not blow off?

A. I lifted it and blowed off seven pounds of steam.

Q. Seven pounds?

A. Yes, sir; so I could plug the tubes.

Q. That is all?

A. That is all.

Q. How long did that take?

A. It took five minutes.

Q. Not more?

A. No, sir.

Q. It did not make much noise?

A. It did.

Q. It did?

A. Yes; quite a little noise.

148 Q. Where did you take on water last before the collision?

A. Up at Rondout.

Q. When?

A. About ten o'clock at night.

Q. In what?

A. Used it out of the river.

Q. Did you stop for that purpose?

A. We did not need to stop—feed it right there.

Q. Did you do it yourself?

A. I did; yes, sir.

Q. When did you last look at the indicator to see the pressure before the collision—I mean before the trouble began?

A. Oh, half an hour.

Q. Half an hour?

A. Yes; half an hour.

Q. It was 70 pounds then?

A. Oh, yes; 70 pounds.

Q. With how low a pressure could she steer?

A. She couldn't steer, I don't think, with less than 35.

Q. If it got below 35 she was going adrift?

A. Yes, sir.

Q. Going to be helpless?

A. Yes; going to be helpless.

Q. And then this fell from 70 to 20 within the space of how many minutes?

A. Less than 15 minutes.

Q. Less than 15 minutes?

A. Yes, sir.

Q. But you did not see it at any time—you did not observe the indicator between the 70 point and the 20 point?

A. No, sir.

By consent of counsel the witness signed his name to the stenographer's notes.

CHARLES E. WAGER, called for claimant, being duly sworn, te fies as follows:

Direct examination by Mr. HYLAND:

Q. Mr. Wager, you are the claimant in this case?

A. Yes.

Q. And you were the captain of the boat "Sydney" at the time of this disaster?

A. Yes.

Q. And commanded both boats coming down the river tow?

A. Yes, sir.

Q. When did you leave Buffalo?

A. On the 18th day of May.

149 Q. The 18th day of May, 1883?

A. Yes, sir.

Q. You went, then, as far as what place before you stopped?

A. Lockport.

Q. What did you do there?

A. I stopped there to clean the boiler.

Q. And did you clean the boiler?

A. I did.

Q. In what way did you clean the boiler?

A. I cleaned it with water pressure and hose.

Q. What kind of cleaning did you give the boiler on that occasion?

A. I had sal-sodiac and catechu and a compound. I had left that in the boiler from Buffalo to Lockport to cut the scales and such stuff out, and I blowed her out there and washed her out with cold-water hose.

Q. Did you draw the fire there?

A. Yes, sir.

Q. In order to do that?

A. Yes, sir.

Q. How long were you there doing that?

A. I was there all day; from seven o'clock in the morning till eight at night.

Q. Did you put on steam then when you started?

A. Yes.

Q. How was your boiler when you started?

A. All in perfect order, for all I knew.

Q. And you started and run to what place?

A. Schenectady.

Q. What happened there?

A. The tubes commenced to leak a very little.

Q. And what did you do after it commenced leaking; you run where?

A. I run on to Troy.

Q. What did you do at Troy?

A. I had them rolled.

Q. And did you have Mr. Pinkerton do the work?

A. I had Mr. Pinkerton do the work.

Q. (Exhibit A of May 13th handed witness.) Did you pay that money?

A. I did.

Q. Did you pay the money stated in that bill?

A. Yes, sir.

Q. Was the engine tested there before you started?

A. Nothing only what I tested her.

Q. What did you do?

150 A. I blowed her steam up to seventy pounds to see what she would do—whether she would stand the steam and not leak any more or not.

Q. What did you find out to be the fact?

A. I found out that her tubes were all right, as far as I could see.

Q. Then where did you go?

A. It was then about eight o'clock at night. I run from there to Albany.

Q. How long did you lay at Albany?

A. I laid at Albany till about four o'clock in the morning.

Q. And then you started. What morning was that—what date?

A. It was four o'clock on the morning of the 29th.

Q. The morning of the day of the accident?

A. Yes, sir.

Q. You run to where?

A. Down to Esopus Island.

Q. Were you on duty from the time you started up to this time?

A. Yes, sir.

Q. Did you go to bed at all?

A. I never went below.

Q. Do you ever go to bed on the river?

A. No, sir.

Q. Do you always stay up on your boats?

A. Yes, sir.

Q. Has that been your practice since you have been running steamboats?

A. Yes, sir—that is, on the river.

Q. What happened first that attracted your attention before this collision happened?

A. The steam coming out of the stack.

Q. At that time where were you?

A. I was standing right by the wheel-house.

Q. What were you doing standing by the wheel-house; giving Mr. Inslee instructions where to go?

A. Yes, sir.

Q. Were you at that time on the lookout?

A. Yes, sir.

Q. Where was your boat in the river at that time?

A. She was headed about west southwest.

Q. I don't care for the points of the compass. I want to know as to the stream.

A. I should think when I was talking to him we were about a quarter of a mile above Esopus, a little to the westward.

151 Q. Which channel were you taking?

A. Taking the west channel.

Q. As to the centre of the west channel, which side were you on at that point?

A. We were a little to the eastward.

Q. How was the wind?

A. It was blowing from the westward.

Q. What kind of wind?

A. The wind was blowing, I should think, at that time about right off from the shore and right down the river at the same time.

Q. Off from the shore and down the river?

A. Yes, sir.

Q. How high a breeze?

A. So that the swells came on deck and I had to canvas the hatches so as to keep the swells from damaging the grain.

Q. You did canvas the hatches?

A. I did, coming around Esopus light.

Q. What was it first called your attention to the bursting of the flues?

A. Steam coming out of the stack.

Q. State what happened from that time.

A. I discovered the steam coming out of the stack. Right in under the wheel-house we have a door. I should think the door was two feet by a foot and a half, so you could go down by the boiler.

Q. Could you go under that?

A. I run down there and looked into the peak-hole, and the steam came out of the peak-hole so I could not look into it; but I knew either the plate bolt was drawn out or a flue bursted.

Q. Then what did you do?

A. I went and took the combustible chamber door out on the inside—it is just latched there. I took it off and saw the flue was bursted in the combustible chamber, in the upper head, and it was working against the upper head and coming down on the upper tubes—the upper tubes on the fire. I then ran right on deck.

Q. Then what happened?

A. I took the wheel myself from Inslee. I saw then that the wind and the tide were carrying me right on to the island, and I saw that if I throwed the anchor I was going to sink both boats or put them on to the island.

152 Q. Then what did you do?

A. I reversed and backed, for to swing them to the eastward of the island, with what steam I had to reverse with.

Q. Then what happened?

A. The "Worden" got—she went down sideways and struck this rock on the sides and behind on her starboard bows, and she settled down and settled on this rock and split her bilge.

Q. What did you do after the "Worden" got on the rock?

A. I uncoupled the steamboat as quick as I could.

Q. What happened then?

A. She throwed me across the stern cabin of the "Worden" into the river and very near killed me.

Q. Did they get you out alive?

A. Yes, sir.

Q. Then what did you do after you got the steamer uncoupled?

A. She swung right around to the eastward of the island and we throwed the anchor.

Q. At that time how much steam did you have on?

A. I don't think we had over fifteen or twenty pounds of steam.

Q. Then after you anchored your boat what did you do?

A. I went and plugged this flue.

Q. What did you do with the fire?

A. I took what fire there was in, and reached through the peak-hole and took out the wooden grate in the peak-hole, and raised that and took what there was left in——

Q. You drew the fire?

A. I drew the fire.

Q. What did you find was bursted of the flues?

A. I found the flue in the upper head of the combustible chamber was cracked where it had been put together.

Q. The flue itself was cracked?

A. The flue itself was cracked down from the top of the sheet about two inches.

Q. Was there more than one flue cracked?

A. No, sir.

Q. Only one flue?

A. Only one.

Q. What did you do when you found that was cracked?

A. I took the door out and took the caps off from the top of the flues, and ordered Mr. Riley to raise the safety-valve and let the pressure off.

Q. What steam was in there?

153 A. We had probably five to seven pounds of steam. While he was letting the pressure off I was making the plugs.

Q. What plugs did you make?

A. I made pine plugs.

Q. What did you plug?

A. I plugged the flue—the ends.

Q. Both ends of the flue that was cracked?

A. Yes, sir.

Q. With wooden plugs?

A. Yes.

Q. Did you start a fire after that?

A. Yes, sir.

Q. It worked with the wooden plugs?

A. I took these plugs and bored a half-inch hole in them. I then took a nine-sixteenth rod and cut threads around this rod and put nuts on them, and run this rod right through the two plugs; and then I put a substance I made onto these plugs, and then two leaden gaskets and two rubber gaskets, and then an iron gasket on top.

Q. What material did you mix and put on?

A. I put black ammoniac, white lead, iron filings, and plaster of paris—mixed it all together.

Q. What kind of a composition did that make?

A. It makes a composition that fire won't burn and water won't go through it.

Q. What time did you get through that job?

A. We got through, I think, about four o'clock.

Q. Then what did you do?

A. I then pulled the anchor up and went to Hyde Park and telegraphed to Buffalo.

Q. How did you go to Hyde Park?

A. With the "Sidney."

Q. How much steam did you have to get there?

A. We had thirty-five pounds.

Q. Was that as much as you got up?

A. Yes, sir.

Q. And you started off with that and you got to Hyde Park?

A. Yes, sir.

Q. Then what did you do?

A. I telegraphed to Buffalo that the "Worden" was sunk, and to New York.

Q. What did you do with the "Sydney?"

A. She laid at the dock.

154 Q. What did you do with her? How did you get from there to New York?

A. We went right alongside of the steamer—the "Saturn."

Q. And towed to New York?

A. Yes, sir.

Q. How much did you carry from there?

A. We carried from twenty-five to thirty and thirty-five. Sometimes we didn't get enough to turn the wheel and at other times we had it from twenty to thirty-five.

Q. When you got to New York what did you do?

A. I went to Mr. Edwards to send the "Atlas" up and get her.

Q. Get her where?

A. Anywhere where the "Saturn" would leave her.

Q. Then what did you do?

A. When I unloaded I took her over to the Pioneer Iron Works and got her fixed again.

Q. Where are those iron works?

A. Over at Atlantic dock.

Q. What did you get done?

A. I got these flues rolled and beaded again.

Q. Then where did you go?

A. I went to Elizabethport and took on a hundred tons of coal.

Q. And then what?

A. And then went to Buffalo.

Q. How long have you been a pilot on the Hudson river?

A. Four years.

Q. When did you get your first papers out?

A. I think the 24th day of August, 1882.

Q. Have you had papers ever since then?

A. Yes.

Q. Do you understand what kind of an engine and boiler this was that was on the "Sydney?"

A. Yes.

Q. What do you call it?

A. Single condensing engine.

Q. With a vertical boiler?

A. With an upright tubular boiler.

Q. Do you know how many men are required to run that boiler and at the same time steer the steamboat?

A. Two.

Q. What are the respective duties of the two?

A. One is for the coal magazine and to oil the engine and put the fender in if any other boat comes alongside, and the other is to wheel her and handle the engine.

155 Q. Does the man that stands at the wheel have absolute control of the engine and its workings?

A. He has full control of her.

Q. And it is intended to be managed in that way?

A. Yes.

Q. When was the steam-boiler inspected before this accident happened?

A. She was inspected, I think, in July prior to this.

Q. Prior to this accident—July, 1882?

A. July, 1882—prior to this accident.

Cross-examination by Mr. McCarthy:

Q. When did you buy this boat or get her?

A. I bought this boat in September. I have it on my book here when I bought it (witness looks at book)—November 18, 1882.

Q. From whom did you buy her?

A. From Gillespie.

Q. He is a partner of this witness you had here to-day, Hall?

A. No, sir.

Q. Or had been?

A. No, sir.

Q. In building boats?

A. No, sir.

Q. He is the Gillespie that Hall mentioned, isn't he?

A. No, sir; I didn't hear him mention Mr. Gillespie.

Q. Yes; he said that Gillespie and he were partners in boatbuilding.

A. Something I didn't know if they were.

Q. What was the name of the man of the Pioneer Iron Works that repaired the boat at New York?

A. I could not tell you.

Q. How long was he engaged in repairing this?

A. Three-quarters of a day.

Q. What was the bill?

A. $3.50.

Q. That was all you had done until you got to Lockport at the end of June?

A. Yes, sir.

Q. And she took up a cargo of coal to Lockport?

A. Yes; except what I done myself.

Q. You took a consort up with you to Lockport?

A. From Troy I did; at the sixteen locks I did; I did not take any up the river.

156 Q. What steam canal-boat were you on before you took the "Sydney?"

A. I owned the "Klock."

Q. How long had you owned her?

A. Very near two years.

Q. What boat did you own before her?

A. I had not owned any steamboat before her.

Q. That was your first experience, was it, in a steamboat—on the "Klock?"

A. No.

Q. Where had you been before?

A. On the "Rapid," on the "Joe Barnes," and on the "Exit."

Q. How long were you on the "Rapid?"

A. Very nearly two summers.

Q. On the "Barnes?"

A. One summer.

Q. And on the "Exit?"

A. Not quite all winter.

Q. Were you ever an engineer?

A. Yes, sir.

Q. Did you receive any education as an engineer?

A. Yes, sir.

Q. Where?

A. In the boiler works at Buffalo—the machine shops there.

Q. What were you doing there?

A. Running an engine there.

Q. How long?

A. Very near a year.

Q. As engineer?

A. As engineer.

Q. Where else?

A. On the lakes.

Q. Where—what boat?

A. I was on the tug-boat "Estelle" one year.

Q. You have had considerable experience, then, as an engineer?

A. Yes, sir.

By Mr. HIGHLAND:

Q. Are you a licensed engineer?

A. I am.

Q. How long have you been a licensed engineer?

A. I have been licensed four years.

By Mr. McCarthy:

Q. Four years since when?
A. Four years I have been licensed.
Q. When do you reckon from?
A. I reckon from 1881.
Q. This is 1886?
A. I mean 1882.
Q. When did you get your license as engineer?
A. In 1882. I can't give the exact date. I think in September.
Q. September, 1882?
A. Yes, sir.
157 Q. Do you know?
A. No; I am not positive about it.
Q. How do you know this boat was inspected in July, 1882?
A. The inspection papers hung up in her engine-room.
Q. That is all you know about it?
A. Yes.
Q. You bought her, you say, from Mr. Gillespie?
A. Yes.
Q. And gave back a mortgage on it?
A. There was a mortgage on it.
Q. You bought her with the mortgage?
A. Yes.
Q. What did you agree to pay for it?
A. I agreed to pay $3,900.
Q. How much did you pay at the time you bought her?
A. I paid him $500 on her at the time I bought her.
Q. That was all?
A. No; I traded an interest of $1,700 in the "Klock."
Q. And then you assumed this mortgage?
A. Yes, sir.
Q. Which was how much?
A. The mortgage at that time? I think the mortgage and interest on the mortgage amounted to somewhere about $2,200 or $2,300.

Q. What repairs did you have done on the boat and where did you have them done from the time when you bought her until the time when this accident occurred?

A. All the repairs that I had done was on that trip coming down.

Q. At Troy?
A. Yes, sir.
Q. $3.50?
A. Yes; and had not needed any.

Q. Never mind; I have not asked you about that. What was done at Lockport on the way down was done by yourself?

A. Yes, sir.
Q. It was done by yourself?
A. Yes, sir.

Q. You cleaned her out by means of your hose?

A. Yes, sir.

Q. Do you think you were there a day?

A. From seven o'clock in the morning until eight at night.

Q. Were you engaged all that time in cleaning?

A. Yes, sir.

158 Q. This bill of repairs that was done in June, after the collision, by this man Hall amounted to how much?

A. $224 I paid him.

Q. Repairs to the boiler and engine?

A. Yes.

Q. That was a pretty large bill, wasn't it?

A. No, sir; it was not.

Q. Not a large bill?

A. No, sir.

Q. Who tested your boiler?

A. There was no testing of the boiler at Troy.

Q. Was there?

A. Nothing, only what I done.

Q. This was the first trip of the boat that season?

A. Yes; the first trip that season on the canal—the first trip on the canal.

Q. Had you been using her through the winter?

A. Yes, sir.

Q. Where?

A. Long Island Sound, lightering for the Central road.

Q. You say you bought her in November, 1882?

A. Yes, sir.

Q. Then you used her constantly down until the time of the collision?

A. No; not constantly; I did not.

Q. Well——

A. (Witness interrupting.) Most of the time——

Q. Whenever you had anything to do?

A. Yes, sir.

Q. During the winter on Long Island Sound?

A. Yes, sir.

Q. And I suppose you started and went up to Buffalo just as soon as the canal opened?

A. I went to Troy; yes; and laid there six weeks, until the canal opened.

Q. And then you went up the canal to Buffalo?

A. Yes, sir.

Q. And took on this cargo of wheat?

A. Yes, sir.

Q. Wheat on the "Worden," and what did you have on the "Sydney?"

A. Corn.

Q. Did you have your boiler tested at any machine shop between the time when you bought the boat and the time that the collision occurred other than you have testified?

A. Yes, sir.

Q. How was the tide at the time of the collision?

A. The tide was running ebb.

Q. How strong?

A. Well, I should think that the tide was about two foot out.

159 Q. How fast?

A. I couldn't tell you how fast it was running.

Q. You are sure it was an ebb tide?

A. Yes, sir.

Q. Sure about that?

A. Yes, sir.

Q. What time in the night did the collision occur?

A. About twelve o'clock.

Q. Was it before or after?

A. Before twelve.

Q. How was the wind; did it run with the tide?

A. It run from the westward and kind of run with the tide; the wind blowed from the westward and down the river.

Q. From the westward and down the river?

A. Yes, sir.

Q. As you were coming down the river was it a pretty dark night?

A. Not so dark but what I could see the island and see the shore.

Q. See it how far away?

A. I saw the island when I came around Esopus light.

Q. How far away was that?

A. It was a mile and a half.

Q. You could see a mile and a half away?

A. Yes, sir.

Q. Then it was not a very dark night?

A. Not for me; it was not.

Q. Which channel did you intend to take coming down?

A. Westward.

Q. Didn't you intend to keep in the middle of the channel?

A. Yes, sir.

Q. Substantially in the middle of the channel?

A. We were in the channel.

Q. You intended to keep about the middle of the channel?

A. And a kind of little towards the eastward.

Q. How wide was the westerly channel?

A. I should think it was half a mile.

Q. How wide was the eastern channel?

A. I should think it was about a quarter of a mile.

Q. Can you take either one if you like?

A. Yes, sir.

Q. Either one is navigable?

A. Yes, sir.

160 Q. How far away from the shore were you as you were coming down the westerly channel?

A. From the westward? Well, I should think probably that I was a quarter of a mile.

Q. When did you last observe your indicator—I mean before you saw there was any trouble?

A. Just above Esopus.

Q. How many pounds pressure did you have then?

A. We had, I think, seventy—sixty-five or seventy.

Q. How fast were you going?

A. We run fourteen miles in five hours.

Q. Fourteen miles in five hours. Then you were going about three miles an hour?

A. Yes, sir.

Q. Was there a man on the lookout except yourself?

A. No, sir.

Q. There was no one?

A. Well——

Q. Except Inslee?

A. No, sir; except myself.

Q. You stood besides Inslee?

A. Yes, sir.

Q. And how far was the wheel-house from the bow of the "Worden?"

A. That boat was 96 feet long—150 feet or more.

Q. Did each boat have an anchor?

A. Yes, sir.

Q. And ready for immediate use?

A. Yes, sir.

Q. As you were coming down the river could you see the west shore distinctly?

A. Yes, sir.

Q. You were not so far away but that you could see it?

A. I could see the landscape, of course.

Q. Did you know at that time that there were rocks to the northward of Esopus Island?

A. Yes, sir.

Q. Did you know all about them?

A. Yes, sir.

Q. Did you know where their location was?

A. Yes, sir.

Q. Did you know how far away they were from the island?

A. Yes, sir.

Q. You had been up and down there before?

A. Yes, sir; and been onto them.

Q. You had been onto them before?

A. Yes, sir.

Q. Onto them in a boat?

A. Yes, sir.

Q. Been in collision with them before?

A. No, sir.

Q. What do you mean by being onto them before?

A. Right back into them with the boat, but not to be on them to any damage.

161 Q. But you have a pretty good acquaintance with them?

A. Yes; lost our rudder before.

Q. How long before?

A. This was, I think, the "Exit."

Q. How long before?

A. This was in 1880.

Q. Then you know these rocks pretty well?

A. Yes, sir.

Q. What was the first indication that you had that there was trouble?

A. Steam commenced coming out of the stack.

Q. Had not Inslee spoken to you before that?

A. No, sir.

Q. Did you observe it as soon as he did?

A. I observed it before any of them did.

Q. How far do you think you were away from the island and these rocks at the time when you first saw steam coming out of the stack?

A. I think I must have been between 35 and 40 rods, to the best of my judgment.

Q. Not a quarter of a mile?

A. Somewhere along about 35 or 40 rods.

Q. Weren't you a quarter of a mile?

A. I could not tell; but, to the best of my judgment, it is about 35 to 40 rods.

Q. You know that a quarter of a mile would be how many rods? How many rods do you call a quarter of a mile?

A. I could not tell you that.

Q. You can't tell?

A. No, sir.

Q. Let us speak of miles, then, and not rods. Do you think you were a quarter of a mile away from the rocks when you first saw them?

A. I might have been.

Q. Do you think you were?

A. No, sir; I don't think I was; I don't think I was over that.

Q. You don't think you were over that?

A. No, sir.

Q. How long a time elapsed from the moment when you saw the steam escaping until you saw that the pressure had got down to twenty?

162 A. From the time I went into the engine-room and came back up on the deck again. Probably it might have been from three to five minutes.

Q. How far away from the rocks were you when you saw the steam had got down to twenty?

A. The "Worden" was about—I was then about the length of the boat above the buoy towards the westward.

Q. How far were you from the rocks when you saw that the steam had got down to twenty?

A. I might have been 200 or 300 feet.

Q. How far were you away from the rocks when your boat began to drift and become helpless?

A. Probably might have been 200 or 300 feet.

Q. Not more?

A. Not more than that.

Q. Up to that time you had control of her?

A. Not exactly.

Q. How far away from the rocks were you when you lost control of the boat.

A. About 200 or 300 feet.

Q. Not more?

A. No, sir.

Q. No more?

A. No, sir.

Q. Before that time you were able to steer her?

A. Not exactly; we had not been.

Q. I will change the question again. How far from the rocks were you when you lost control of the boat?

A. Well, I might have been 300 feet—200 or 300 feet.

Q. Were you able to steer her before that time?

A. No, sir.

Q. Then, you had lost control of her? Don't you understand my question? There was a time, was there not, when you were no longer able to steer the boat?

A. We did not have steam to handle her.

Q. When was that? How far from the rocks were you at that time?

A. I can't tell; but to the best of my judgment it was from 200 to 300 feet.

Q. Then, when you were 300 feet away you were able to steer her?

A. She was drifting sideways when, I think, she was 200 or 300 feet away.

Q. Before she began to go sideways you were able to steer her?

A. Yes, sir; we were able to steer her then.

163 Q. Weren't you as much as a quarter of a mile away from the rocks when you ceased, as you say, to have any control over her?

A. I don't think we were.

Q. How do you explain the fact? Do you say that you drifted on these rocks?

A. Yes; we drifted sideways.

Q. Sideways?

A. Yes, sir.

Q. You being utterly unable to help manage her?

A. She was backing with what steam she could until she stopped on her centres.

Q. Did you have any influence over her at all?

A. None; no.

Q. How do you explain the fact that she drifted sideways on the rocks?

A. Because as quick as I discovered this flue was bursted I told Mr. Inslee to head her right to the westward, and one way they hold the port wheel they don't hold the port wheel very good, and the other way they hold the starboard wheel very well. The starboard wheel will turn these boats around, but the port wheel will not.

Q. If you were coming down near the centre of the west channel and ported your wheel, how did it happen that you struck sideways the rock? Give the fullest explanation you can of that.

A. Because the tide and the wind had fetched them right over. The tide run across the head of the island there.

Q. From what point above that island does the tide take that set—the ebb tide?

A. I think the tide takes the set, in my experience, from the lower end of Esopus flats.

Q. When you are a quarter of a mile above that island does the ebb tide run from the west channel across the head of the island?

A. In my experience, it has.

Q. Is that so?

A. Yes, sir.

Q. If, then, a boat coming down the west channel loses all control over her movements when she is a quarter of a mile above the island, then the ebb tide, you say, will carry her over to the eastward and onto the rocks?

Objected to.

164 A. It will, provided there is a heavy wind, the same as I had that night.

Q. Leave the wind out of the question altogether, will the tide?

A. It will have a tendency; yes.

Q. I don't ask about the tendency. Will the tide do it?

A. Carry her over towards the island? Yes.

Q. Will it carry the boat over on those rocks?

A. Not if there is not any wind. When she is a quarter of a mile away she will go below the rocks. The tide will take her below them.

Q. Will the tide take her clear of the island?

A. No, sir.

Q. Bring her up on the island?

A. Yes, sir.

Q. But it will take her below the rocks?

A. Below the rocks; yes, sir.

Q. You mean to say, then, that the set of the ebb tide from the west channel is toward the rocks?

A. Right across the head of the rocks—the point of the rocks.

Q. It is towards the rocks when you are a quarter of a mile to the north?

A. Yes.

Q. What is the set of the tide in the east channel?

A. It sets right down the river.

Q. So we may have no mistake about it, I want to repeat that question: When you are a quarter of a mile or a less distance above these rocks and in the west channel, the ebb tide sets down on the rocks?

A. Sets right over across the head of the rocks—on the east side—and then sets back again to the south end of Esopus Island.

Q. You understand that question, don't you?

A. If a quarter of a mile above.

Q. I want to give you fair play. You understand it, do you?

A. I understand it; yes, sir.

Q. You may, if you desire to, explain and enlarge upon that answer as much as you wish.

Objected to.

Q. Now, explain again, if you please, how it happened that
165 with the tide setting, as you say it did, that the "Worden"
struck these rocks on her port side.

A. She went down sideways. If she went down head on she would have struck on her side.

Q. It comes to this: How did it happen, if the tide sets as you say it did, that she went out sideways?

A. The wind took her there; the wind and the tide carried her there.

Q. And you were seriously of the opinion that if you had thrown out both these anchors you would have sunk both boats?

A. I would have sunk both boats, to the best of my judgment.

Q. Will you explain how that could have happened?

A. If I had thrown these anchors over the bow, the way we were going, they would have checked her up and put the stem of the steamer right on, and the other boat would have come right along on the end of the rocks.

Q. You assumed the anchors would have dragged?

A. The anchors would have checked her. Before the anchors got any hold they would have checked enough to get her on sideways.

Q. You assume that the anchors would have dragged?

A. It might have dragged and it might have catched.

Q. Suppose you had thrown these anchors when you were five hundred feet away from the rocks and they had not dragged, what then?

A. If they had caught and held, by the tide and the way the wind was going, they might have pulled the cleats out of the deck.

Q. They might have done it. They might have pulled the bottom of the river up. Suppose you had thrown these anchors out when you were 300 feet from the rocks and they had held?

A. Then the stern of the steamboat would have come right onto the rocks.

Q. When you were 300 feet away?

A. Yes, sir.

Q. Was the steamboat 300 feet long?

A. No, sir; 100 feet long.

Q. If you were 300 feet away and you had cast your anchors and your anchors had held, how could you then have struck the rocks?

A. When you throw the anchor overboard you have got to give it about 250 to 300 feet before you can fetch it up with the line.

166 Q. That depends upon how fast you are going, don't it?

A. No, sir; it depends where you throw it—if you throw it where there is not 200 or 300 feet.

Q. Even when you are drifting?

A. Yes, sir.

Q. You drifted on these rocks very easily?

A. Yes, sir.

Q. Very easily?

A. Yes, sir.

Q. Very easily?

A. Yes.

Q. The "Worden" did not get any harm when she first struck the rocks?

A. Yes, sir.

Q. It was afterwards when she was on the rocks?

A. No, sir; she went on there and split the bilge.

Q. Did she go on hard?

A. She went on—she did not go on so very hard.

Q. How many hundred tons of corn did you have on the "Sydney?"

A. I had 7,500 bushels on her.

Q. What was her tonnage?

A. 129 tons.

Q. How high out of the water was her shear-plank?

A. She was three feet out—the shear-plank was.

Q. How far was her rail out of the water?

A. The rail is only six inches higher than the shear-plank.

Q. How high was the "Worden" out of the water?

A. About the same.

Q. How many houses were there on the deck of the "Sydney?"

A. Pilot-house, coal-bumper, and caboose, engine-room, and forward cabin.

Q. All on the "Sydney?"

A. Yes, sir.

Q. What are the dimensions of the pilot-house—how long and how high?

A. The length is about five feet one way and about four feet the other.

Q. And the forward cabin?

A. The forward cabin is 14 by 12.

Q. Wide. And how high?

A. From the deck, you mean, up?

Q. Yes.

A. About 15 inches.

Q. How far is Hyde Park from Esopus Island, where you came in collision?

A. Three miles.

Q. Not any more?

A. I never heard it called any more.

Q. Did you have a man on board your boat by the name of Hibbard?

A. Some such name as that; yes.

167 Q. Do you remember a Mr. S. G. Smith, the agent at that time of the——

A. I remember he said he was afterwards—a long time afterwards—a month afterwards.

Q. You remember him. Did you on any occasion after this collision tell him that the mortgagee, Gillespie, was running the boat "Sydney" on as small an amount or as little an amount as possible and would not spend any money on her?

A. That he was running her?

Q. Did you say that he would not spend any money on her, and that he was running her on as small an amount as possible?

A. I did not have to——

Q. Did you tell Mr. Smith that or anything like it?

A. No, sir.

Q. Did you tell him that you, Wager, had not any money to spend on her, because you gave it all to the mortgagee—all you made?

A. No, sir; I did not.

Q. Nothing like that?

A. No, sir; I did not.

Q. Weren't you told at Troy, when you stopped there, that your boat ought to have more repairs put on her?

A. No, sir.

Q. By anybody?

A. No, sir.

Q. Did you stop at Troy for any other purpose than to have these repairs put on?

A. No, sir.

Q. Now, I want you again to give the shortest possible distance that you were to the north of these rocks when your boiler gave out or when you first saw that you were in trouble. Give yourself the benefit of the doubt and give us the shortest possible distance.

A. I gave it to you.

Q. What did you say—the shortest possible distance?

A. It probably might have been——

Q. Don't give it in rods, but give it in parts of a mile.

A. We might have been a quarter of a mile, more or less.

Q. That is as near as you can come to it?

A. That is as near as I can come to it.

Q. The slowing down of the steam was gradual, then, wasn't it?

A. No, sir; it was very quick.

Q. Very quick?

A. Yes.

Q. Within what time?

A. Within a few moments.

168 Q. That means nothing. Within what time?

A. Within two or three minutes.

Q. Two or three minutes?

A. Yes, sir; or four minutes.

Q. How far would the boat go ordinarily in the time when the steam was sinking?

A. She would not go much faster than the tide was going and after she lost her headway.

Q. What is the lowest pressure under which she would steer?

A. About 35 pounds.

Q. Won't she steer with 30?

A. If I run her alone she might.

Q. Take a consort with her?

A. No, sir; she won't, and handle her.

Q. You have got to have 35?

A. Yes; and from that to 50 or 40.

Q. And how many pounds to the square inch must she have on in order to blow?

A. To blow off?

Q. Yes.

A. That is according to what she is set at.

Q. Answer it in your own way.

A. Seventy pounds, if you set her at 70.

Q. Or exhaust? By exhaust you mean the same thing as blowing off?

A. No, sir; I do not. Exhaust and blowing off are two different things.

Q. What is the difference?

A. One exhausts steam, blows into the condenser; that goes down the side and you cannot see it. There it is condensed into water and pumped back into the boiler. When she blows off out of the safety-valve that condenses in water, evaporates, and blows away. You can see it and hear it.

Q. Did she either blow off or exhaust after the collision?

A. Nothing, only from just a little pressure—from 5 to 7 pounds; that I raised the safety-valve and let out of her.

Q. She did not exhaust at all?

A. No, sir.

Q. And she blew off from 5 to 7 pounds?

A. Yes, sir.

Q. That was done by your raising?

A. That was done by my raising the safety-valve after we got to an anchor.

169 Q. Did you try to haul the "Worden" off the rocks?

A. I had no steam to haul her with.

Q. (Question repeated.)

A. We let the steamboat back all she would go back while we tried to get the couplings off.

Q. Did you try to haul the "Worden" off?

A. No more than that.

Q. Did you try to haul the "Worden" off by means of the "Sydney?"

A. Yes, sir; to a certain extent I did that.

Q. Were you able to haul at all on the "Worden?"

A. No, sir.

Q. You were not?

A. No, sir.

Q. Beyond what point will no engine not exhaust?

A. The exhaust—what does that indicate? *A.* If she exhausted?

Q. Yes.

A. Do you mean high or low pressure?

Q. Such pressure as you had on.

A. It would indicate she was going.

Q. What pressure would that indicate?

A. If an engine was exhausting?

Q. Yes; on the boiler, what pressure would that indicate in the boiler?

A. An engine—we wouldn't exhaust if she was pulling down a good vacuum; we would exhaust with about thirteen pounds of steam if she was forming a good vacuum.

Q. Suppose after a collision the engine exhausts—suppose your engine exhausted after you got on the rocks, what does that indicate; does not that show that there must be greater pressure on her boiler than 30 pounds to the square inch?

A. Yes, sir; but you can't steer when she exhausts. No one can steer when she exhausts. You can only faintly hear her by putting your ear on the meter and on the condenser.

Q. You know nothing about it but what you hear?

A. That is all; you put your ear against the cylinders. That is the way we have of telling whether our valves are right or not.

Q. Do you know Hibbard that was on your boat?

A. I do.

170 Q. Did you have a conversation with him right after he came on deck?

A. Nothing more than only when I put him off here.

Q. I mean up there. Did you have a conversation with him right after he came on deck; right after the collision—soon after the collision?

A. No, sir. I don't recollect it.

Q. At the time of the collision Hibbard was below deck?

A. Yes, sir.

Q. After the collision he came right on deck, didn't he?

A. He came on deck, probably, when I went over and called him. I don't know just how long a time it was.

Q. Didn't you then have a conversation?

A. I don't remember having had any.

Q. Didn't you then tell him that the boat had floated on the ledge?

A. I don't remember.

Q. Didn't you then tell him that your fires had got down some?

A. No, sir.

Q. That there was some leakage?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Now, I will ask you again, isn't it true that there was little or no wind at the time?

A. No, sir; there was a good stiff breeze a blowing at the time, so that I had damaged grain in the bow of the "Sydney."

Q. How long had you been up at the time of this collision—how many hours had you been about?

A. Since four o'clock.

Q. That morning?

A. That morning.

Q. You had been on your feet about twenty hours?

A. Sitting down on the stool on the deck, or——

Q. You had been awake?

A. Yes, sir.

Q. Wasn't it the fact that the "Worden" drifted half her length upon this ledge?

A. No, sir; it was not.

Q. It is wholly untrue?

A. Yes. If she had there would not have been a plank left in her bottom. There was not a plank taken out of her bottom—only at the bilge.

Q. Now, didn't you anchor up the stream some 300 feet from these racks?

A. No, sir.

Q. Is that so?

A. No, sir; we did not.

171 Q. Didn't you anchor 100 feet above the rocks?

A. No, sir.

Q. Northward of the rocks?

A. No, sir; we anchored to the southward of the rocks.

Q. Didn't you anchor 300 feet or more or less to the north of where the collision occurred?

A. We anchored to the southward of the rocks, very near down to the point of the island.

Q. Southward of where the collision occurred?

A. Yes, sir.

Q. Do you know how wide this ledge is?

A. This ledge of rocks?

Q. Yes.

A. That we were on?

Q. Yes.

A. I don't; the reef probably runs out there fifty feet where we were.

Q. Now, I want you to describe again just where it was that this leak occurred. You say your boiler was vertical?

A. An upright tubular boiler.

Q. And it consisted of how many tubes?

A. 73 tubes.

Q. 73 tubes?

A. Yes; taking in the return tubes and the direct tubes.

Q. These tubes are in the flues, are they not?

A. Yes, sir.

Q. And how many flues does your boiler consist of?

A. 73, I think.

Q. Tubes as well as flues?

A. Yes.

Q. You mean by flues, tubes?

A. All the same thing; flues are tubes.

Q. They are in a case, are they not?

A. Setting right up and down; the same as taking a barrel head and tearing it——

Q. The boiler surrounds them—what you call the boiler?

A. Yes, sir.

Q. How many parts about the boiler?

A. There are five heads to the boiler—five parts to it.

Q. And these tubes are inside the boiler?

A. Yes, sir.

Q. And the boiler, as you say, is upright?

A. Yes, sir.

172 Q. How many feet high is the boiler?

A. The boiler is nine feet.

Q. In height?

A. Yes.

Q. And how much is its diameter?

A. Four feet and four inches.

Q. And what is its thickness?

A. Three-sixteenths.

Q. And the fire-box is in the bottom?

A. The fire-box is in the bottom.

Q. How high is the engine-room?

A. From the deck up?

Q. No. How high? What is the height of the engine-room?

A. From the bottom of the boat up to the top of the engine-room, about twelve feet.

Q. How was the engine-room connected with the wheel-house?

A. The engine-room was the same as—here is the wheel-house and the sides are right here (witness indicating).

Q. You don't go from one to the other, do you?

A. They are right together—adjoining—right together.

Q. The wheel-house is forward of the engine-room?

A. The wheel-house is right forward of the boiler. You stand with your feet almost right against the boiler.

Q. If you want to get into the engine-room from the wheel-house how do you manage to do it?

A. You can go down below right under the wheel or step right on deck and go down the hatch.

Q. That is the usual way?

A. Yes, sir.

Q. Where did you observe this leak—top of the boiler or bottom of the boiler?

A. Top of the boiler, in the combustible chamber—the lower head of the combustible chamber.

Q. Where is the combustible chamber?

A. Right about four or three feet from the top of the boiler down into it. It is big enough for a man to crawl in around there.

Q. There is a place big enough for a man in this combustible chamber?

A. Yes, sir.

Q. Do the flues extend up to the combustible chamber?

173 A. About half an inch; sometimes comes through a sixteenth and sometimes comes through an eighth.

Q. You could see from the outside this crack or leak?

A. I could see water gushing and steam coming out of her after I took her door down.

Q. The door of the combustible chamber?

A. Yes, sir.

Q. How does it open?

A. It opens right behind the stack, with two claws projecting out, with a nut.

Q. You can see it, then, plainly?

A. Yes; by taking that out.

Q. By opening the door?

A. Yes, sir.

Q. How long a crack was it?

A. It was a crack about two inches or an inch and a half long; somewhere along there.

Q. How wide was it?

A. It was wide enough so I could stick my knife-blade clear through it.

Q. Your knife-blade?

A. Yes, sir.

Q. Do you feel certain that there was the seat of the trouble?

A. Yes, sir.

Q. And nowhere else?

A. Yes, sir.

Q. How far from the outside of the boiler?

A. Right in the centre of the boiler, by the magazine.

Q. How was that repaired by Mr. Hall, in Lockport?

A. By a new flue being put in.

Q. A new flue put in?

A. Yes, sir.

Q. Then it was in the flue that it was cracked?

A. The flue cracked; yes, sir—bursted; cracked right down where the flue had been welded together.

Q. Where it had been welded together?

A. Yes; where it had been rolled—where it had been made; there is a ridge in all these tubes.

By consent of counsel the witness signed the stenographer's notes.

174 U. S. Circuit Court, Southern District of New York.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY *et al.*
against
THE STEAM CANAL-BOAT "SYDNEY" and THE CANAL-BOAT "WILLIAM WORDEN."

NEW YORK, *May* 29, 1886.

Present: The commissioner; Edward D. McCarthy, for libellants; J. A. Hyland, for plaintiff.

GEORGE W. WEED, called on behalf of libellants, being duly sworn, testifies as follows:

Direct examination by Mr. MCCARTHY:

Q. How old are you, Mr. Weed?

A. Thirty-two.

175 Q. What is your business?

A. Fisherman in the spring and laborer the rest of the year.

Q. Where do you reside?

A. In the town of Hyde Park, directly east of Esopus Island, on the southeast of Esopus Island—directly east.

Q. How long have you resided there?

A. For the present about a little over a year. My father lived there for eleven years or more, and I lived with him off and on part of the time; thoroughly acquainted with the surroundings.

Objected to.

Q. Do you know the river at and about Esopus Island?

A. Yes, sir; every inch of it.

Q. How well do you know the river there—thoroughly?

A. Yes, sir. I know the actions of the tide there thoroughly; have drifted nets all about the island, and for that reason know the action of the tides.

Q. How wide is the river just above Esopus Island, taking in both the east and west channels?

A. Well, it is called a mile, and I suppose it is nearly that, from shore to shore.

Q. Say for two miles above Esopus Island, what is the character of the west shore?

A. It is bold; the west shore is navigable quite close in.

Q. The shore, you say, is bold?

A. Yes, sir.

Q. How high a shore is it; how high is the bluff?

A. Quite high; quite high in places; embankments all along there.

Q. The channels are called the east and west channels, you say?

A. Well, yes, sir; we term it that.

Q. Which is the one usually navigated by boats coming down the river?

A. Well, I don't know as there is any choice; they are governed a good deal by the winds and tides.

Q. They are both navigable?

A. Oh, yes, sir.

Q. Which is the wider channel—the eastern or the western?

A. The westerly.

Q. How wide would you call the west channel?

176 A. At the island, perhaps, it is half a mile; of course, water is deceptive.

Q. And the east channel is about how wide?

A. It is not that, of course; it is the width of the island. I should think the west channel was as wide as the east channel and the island combined.

Q. Where are these rocks that lie to the north of the island?

A. They are north of the island, about——

Q. How far up do they run?

A. Perhaps 700 feet—800 feet.

Q. Is it one continuous stretch of rock or groups?

A. Broken.

Q. Broken groups?

A. Yes, sir; sunken, and some crop out more than others, of course.

Q. Have you made a little diagram of the river — that point?

A. Yes, sir.

Q. (Paper shown witness.) Is this it?

A. Yes, sir.

Q. Is it reasonably accurate?

A. Well, yes, sir.

Said paper is marked Libellants' Exhibit 1, May 29, 1886.

Q. North is where (counsel indicating)?

A. North is towards the light-house.

Q. Just take a pen and ink and mark those rocks a little more legibly; just as you have done it, but more legibly.

A. I will do it to the best of my ability. (Witness marks on said Libellants' Exhibit I.)

Q. Did you see the canal-boat William Worden after she ran on one of those ledges or rocks?

A. Yes, sir.

Q. How soon after?

A. I couldn't tell you; I couldn't remember the dates at this length of time.

Q. Was it before she had been taken off by the wrecking master?

A. Oh, yes, sir; that must have been before that or I would not have seen her on.

177 Q. And was it before the wrecking master went there to work on her?

A. Yes; she was all alone by herself when I first saw her.

Q. You don't know whether it was the morning after she ran on?

A. No, sir; I do not.

Q. I want you to indicate the rock where she ran on.

A. I have; I have marked there where the boat was.

Q. That is, it was on that rock which lies to the eastward?

A. Of the principal ledge.

Q. Of the principal ledge?

A. Yes, sir; of the main ledge.

Q. And about as it lies there?

A. Yes.

Q. How did she lie on that rock when you saw her?

A. She lay quite well on it.

Q. Was she bows on or side on?

A. She was about south, bearing a little west, and canted somewhat; she had been run bow on; there was no question about that.

Q. She had been run bow on?

A. Yes.

Q. From the way she lay could you say she had been run bow on or not?

A. I should say so; yes; bow on.

Q. How far on was she?

A. Nearly half way, or quite.

Q. Now, could that boat have floated or drifted on that ledge of rocks from any point whatsoever in the west channel?

A. No, sir.

Q. Now, take any point below the light-house. How far above the ledge of rocks is the light-house?

A. Two miles and a half or three miles, or somewhere along there.

Q. Now, take any point in the west channel between these rocks and the light-house. Could this boat have drifted onto the rock where you saw her lying from any such point in the west channel?

A. I don't think she could; no, sir—that is, if she had no other motive power than wind and tide to propel her.

Q. That is, drifted on—do you understand me?

A. Yes; I understand you; she could not.

Q. Are you sure about that?

178 A. Quite sure; yes; I can give you my reasons for so saying if you want them.

Q. Yes.

A. In the first place, the tide, when it strikes a movable object, has a rebound——

Q. Never mind that.

A. I am only saying that I do not think the boat could drift on the island from any point, propelled by the tide.

Q. How does the ebb tide run past that ledge of rocks?

A. It runs south, of course, till it strikes that, and then branches off either side—either one side or the other.

Q. Does the ebb tide set onto that ledge or away from that ledge?

A. Away from it.

Q. Suppose a boat became helpless.

A. I want to know what you mean by the term "helpless." I want to answer you intelligently, and I want to know what you mean by the term "helpless."

Q. Suppose a boat became helpless—that is, lost all motive power so that she would drift—and was in the west channel—about in the middle of the west channel—and was, say, about a quarter of a mile north of the rock, which way would she drift on the ebb tide?

A. She would drift directly down the west channel, of course.

Q. Could she possibly drift onto the ledge where you saw this boat?

A. I don't think she could; no, sir.

Q. Are you sure about that?

A. Quite sure; yes, sir. As far as my experience of tides has been there, I do not see how in the name of goodness she could get there.

Q. Are you acquainted with the run of the tides there?

A. Yes, sir.

Q. Suppose there was a strong wind blowing from the westward at the same time the tide was running ebb, what effect would that have on a boat like the Worden, loaded?

A. It does not have any great material effect on it. Another thing is if it is a strong west wind he had no business near the island, anyhow, if he was a boatman.

Q. If it was a strong west wind?

A. Yes, sir.

179 Q. Why not?

A. He had a right to stay as close to the west shore as he could, to be protected from that wind.

Q. On the west shore is the bluff there high enough to protect from the wind?

A. Yes, sir; to the extent that all tows and boats take the west shore close in from the westerly wind.

Q. They do?

A. Yes, sir; that is the universal custom.

Q. What have you got to say in regard to the position of this rock where the boat was found and the other rocks which on your diagram appear to lie to the west of it? I ask you how could a boat get past the other rocks, no matter what force propelled her, and get on that point.

A. She could not from the westward, I don't think. She would naturally strike the other rocks, as they are higher, as there is less water over them than the one she was on.

Q. And they are above this?

A. Yes, sir.

Q. They are to the west and above it?

A. They are to the north and westward.

Q. Which way does the tide in the east channel set?

A. Away from the rocks—away from them.

Q. Now, I again ask you: Drop a motionless and helpless body like a boat, for example, that has no steam or sails—that has no motive power at all—drop a motionless body like that in the west channel when the tide was half ebb, could she possibly drift onto the rock where you found the boat Worden?

A. No, sir.

Q. You don't know about the collision itself?

A. No, sir.

Q. You did not see the steam canal-boat Sydney there at all?

A. No, sir.

Q. Are you in the habit of spreading your nets all about there?

A. Yes, sir.

Cross-examination by Mr. HYLAND:

Q. Who subpœnaed you?

A. Thomas J. De Laney.

180 Q. Where did he subpœna you?

A. Upon the fishing place yesterday.

Q. Who spoke to you first about what you knew about this rock?

A. De Laney.

Q. When?

A. Yesterday.

Q. Were you ever spoken to before yesterday with reference to this boat having been sunk on that rock and with reference to what you knew about it by any one?

A. No, sir.

Q. What were you doing yesterday when you were subpœnaed?

A. Hauling on my net.

Q. Who gave your name to De Laney; do you know?

A. I did, I guess.

Q. And that is the first time that you ever heard of any lawsuit in this case?

A. Yes, sir.

Q. You never talked with any one before about this matter?

A. Well, no; not as a lawsuit; I have spoken about the boat being sunk at the time, as we will, of course, of any occurrence at the time.

Q. How long have you lived in that vicinity?

A. Thirteen or fourteen years.

Q. Where were you born?

A. Cleveland, Ohio.

Q. During the thirteen or fourteen years—what have you been doing all that time?

A. Oh, everything.

Q. State what it is.

A. It is not necessary; it has nothing to do with this case at all.

Q. Tell me what you have been doing for the last thirteen years.

A. I don't choose to.

Q. You don't choose to tell me what you have been doing for the last thirteen years; why not?

A. Because it don't bear on this case.

Q. Is that the only reason you have?

A. That is my reason, and that is the reason I give you, and that is a sufficient reason.

Q. I want to know what you have been doing for the last thirteen years.

A. All right.

Q. Do you refuse to answer that question?

A. Yes, sir.

Q. Absolutely?

A. Yes, sir; because I don't think it bears upon the case.

181 Q. Have you ever been in jail?

A. Yes, sir.

Q. How many times?

A. Oh, once.

Q. Have you ever been in the State's prison?

A. Yes.

Q. How many times?

A. Once.

Q. How long a term did you serve?

A. I don't know as that has got anything to do with this case.

Q. I ask how long a term you served in the State's prison.

A. All right; go ahead and ask away.

Mr. McCarthy: Answer the question.

Witness: Two years and seven months.

Q. What were you sent to State's prison for?

A. Burglary.

Q. When were you there?

A. I refuse to answer any more questions in regard to this matter; it has nothing to do with the sinking of the boat at Esopus Island at all, and I don't intend to answer any more questions in regard to it; that is my ultimatum.

Q. I want to know when you went there.

A. It don't make any difference what you want to know; I tell you I won't answer any more questions in regard to the matter; that settles it. I came down here to tell you what I knew about the tides, and how they acted around Esopus Island; that is what I came for.

Q. I want to know where you were in the year 1883?

A. In the year 1883 I was living right at or about—I was living near the same place I am now; not a mile away from there.

Q. When did you come out of prison?

A. 1875 or 1876; somewhere along there.

Q. When were you convicted and sent to State's prison?

A. About three years before that.

Q. Have you ever made any measurement of the rocks there?

A. No, sir; only sounding the water around at different times.

Q. How did you come to draw a map here indicating the different ledges, if you have made no measurements? 182

A. A man living around there for thirteen or fourteen years ought to know something about those measurements.

Q. Do those rocks bear?

A. Certainly, at times.

Q. When?

A. At very low waters.

Q. When have you seen them bare?

A. Very low waters.

Q. When?

A. At low waters.

Q. When did you see them at low waters?

A. When the tide was very low.

Q. When was that; in what month?

A. I can't give you the exact time; I don't remember such things.

Q. Can you give any time when you ever saw them?

A. Numerous times. Westerly winds, of course, drive the tide out, and they are more out of water then than at other times.

Q. Is that one continuous reef of rock from the island out to a point?

A. I should say yes—higher at some places than at others.

Q. Then why have you drawn a diagram indicating that they are simply blocks of rock and not a continuous rock?

A. I simply drew them as they cropped out of the water—as I saw them.

Q. Then in reality it is one continuous rock from the island out?

A. Yes, sir; higher in some places than in others.

Q. It is continuous?

A. Yes, sir.

Q. How much water on them at high tide?

A. Some of them more and some less.

Q. Do you mean to say that that diagram is correct?

A. No, sir; it is as near a rough sketch as a person would make.

Q. Do you mean to say that the line of shore on the east side, opposite the rocks, is as near a straight line as you have drawn it?

A. I don't think it is; no.

Q. Why didn't you draw it as it is?

A. I was simply drawing the island and the channels on either side.

183 Q. Do you know what the outline of the east shore opposite Esopus Island is, as to curve?

A. I ought to.

Q. Then I hand you a diagram and ask you if the outline for the east shore is more like the diagram I hand you?

(Paper shown witness.)

A. What is that supposed to be (witness indicating on paper)?

Q. That represents Esopus Island.

A. I don't think that the shore is any more correct on here than on mine.

Q. Don't you think that that is the curve, according to the curve of the shore (counsel indicating)?

A. This curve here?

Q. The curve on the east side here—isn't it possibly more correct than your line?

A. Yes.

Said paper is marked for identification Claimant's Exhibit A, May 29, 1886.

Q. Do you mean to say that the boat Worden was grounded on the rocks on the east side of that reef?

A. Yes, sir.

Q. Do you mean to say that she was grounded on the rocks south of the end of the rock or was it on the end of the rock?

A. There are rocks north of where the boat laid.

Q. How far north of where the boat laid?

A. I couldn't tell you exactly.

Q. Were there rocks ten feet north of where the boat laid?

A. Yes, sir; I guess so.

Q. Do you guess or do you know?

A. I couldn't tell you exactly.

Q. You can't tell me exactly?

A. No; I know there are rocks north of it.

Q. Do you know how deep down in the water those rocks are north of it?

A. They are not as deep down as the one that she was on.

Q. Do you know whether or not the rock that she was on is ever exposed at low tide or not?

A. I don't hardly think it is.

184 Q. You don't hardly think it is?

A. No.

Q. Do you know on which side of the boat that rock was highest in the water as she lay there?

A. The east side, I think.

Q. On the east side—you are sure of that?

A. I wouldn't lay great stress——

Q. The rock on the east side was higher than the rock on the west side?

A. I think it was; yes.

Q. Then, what did you mean when you swore that that boat could not float onto the rocks from the west side, a moment ago, in your direct examination?

A. How could she get over that ledge of rocks there (witness indicating)?

Q. Didn't you say that the rock was highest on the east side of the boat?

A. The rock that she was on—the rock she was on was a different ledge of rocks altogether.

Q. A moment ago you swore that you could not tell whether there was any rock beyond ten feet north of her.

A. Yes.

Q. Do you know which way the boat came from when she floated on that rock?

A. If she came the way she was headed she came from the north.

Q. She came from the north?

A. Or in a northerly direction.

Q. Isn't it true that on an ebb tide for a quarter of a mile above that reef of rocks the water flows across towards the east to pass on the east side of the island?

A. I guess not.

Q. You guess not; do you know not?

A. Yes, sir; I know not—that is, I mean that the water over here does not flow in this direction (witness indicating).

Q. I mean towards the center of the west channel——

A. (Witness interrupting.) The channel above the island—above here—runs from the west (witness indicating).

Q. Take it from the center of that channel?

185 A. The water on the west side here (witness indicating)?

Q. I mean from the center of the channel above the island for a quarter of a mile, if it does not flow to the eastward of the island?

A. Naturally, of course—not from the center of the westerly channel, from the center of the river, perhaps, it flows, and the island splits it, of course.

Q. The island splits it and it flows to the east?

A. Yes, sir; about half of it, the other half towards the other side; the smaller half flows to the east.

Q. So you have never made any measurements as to those rocks there?

A. No; I never was interested enough in them to do that.

Q. And since you have been subpœnaed you have not examined the rocks?

A. No, sir; I would have if I had had time. I didn't have time.

Q. Were you on that boat while she was lying there sunk?

A. No; I was around and about it with a row-boat.

Q. You were around her with a row-boat?

A. Yes, sir.

Q. Were you there when the wreckers were raising her?

A. No.

Q. Do you know how wide the rock is at the north end?

A. No.

Q. Have you ever seen the surface of the rock where this boat lay grounded?

A. I could not say that I have.

Q. Have you ever placed any nets near that rock?

A. I have fished north, south, east, and west of it. I never fished on the rock itself.

Q. You never had any occasion to fasten your nets to that rock?

A. Not particular; we are not steam canal boatmen and we avoid those rocks.

Q. You have split on one rock, however?

A. I had my just due.

Q. As a matter of fact, you don't know how that boat got on that rock at all?

186 Mr. McCarthy: He don't pretend to. I object to the question.

Q. As a matter of fact, you don't know how that boat got on the rock at all?

Objected to.

A. She got shoved on by some power other than wind and tide.

Q. How do you know that?

A. Because it would be impossible for the wind and tide to get her there.

Q. How do you know that?

A. How do you know anything?

Q. How do you know it?

A. I know it because I know it.

Q. Is that all the reason why you know it?

A. That is a sufficient reason, I should think.

Q. How deep is the water there at hight tide, on the rocks?

A. I couldn't tell. I never measured it.

Q. How deep at low tide?

A. I couldn't tell you. I never measured it, and the tides vary, besides. Sometimes they are higher than they are at others.

By Mr. McCarthy:

Q. Give an approximate answer if you can.

A. I could not. I am just telling him the truth.

By Mr. Hyland:

Q. Have you ever been on any boats?

A. Yes, sir.

Q. Running up and down the river?

A. Yes, sir.

Q. In what capacity?

A. Cook. I run a barge about three or four months. I was cook on sailing vessels and barges.

Q. Did you ever try those rocks there while the boat was lying there?

A. No, sir.

187 Q. How do you know, then, how the rock was with reference to whether it was one side of the boat or the other?

A. As she lay there you could see she canted somewhat.

Q. Is that all you know about it? Is that the only reason you have?

A. Isn't that a sufficient reason?

Q. Is that all the reason?

A. That is all the reason.

The signature of the witness is waived.

Milton S. Risley, called on behalf of libellant, being duly sworn, testifies as follows.

Direct examination by Mr. McCarthy:

Q. Mr. Risley, how old are you?

A. About fifty-four.

Q. What is your occupation?

A. Fishing and farming and painting.

Q. Where do you live?

A. Staatsburgh.

Q. How far from Esopus Island?

A. Well, I should think about a mile and a half.

Q. Do you know that island?

A. Yes, sir.

Q. How long have you been fishing at and about that island in the Hudson river?

A. Well, I should think about twenty-five or thirty years.

Q. Do you know the set of the tides from the north onto and around that island?

A. Yes, sir.

Q. How many channels are there in the river—navigable channels—there?

A. Two—east and west.

Q. How wide is the river?

A. Well, I should think it was nearly a mile wide.

Q. How far above the head of this island does the river split into these two channels?

A. Well, probably six or seven or eight hundred feet; along there—all of that—and when the tide sets off, it sets off just this way—each way (witness indicating) just like the letter A—a big A.

Q. Take a half ebb tide. How does it set in the west channel, above that island?

A. When it gets there to that point it slants off.

188 Q. Which way does the west channel set on a half-ebb tide?

A. It works to the west.

Q. The tide?

A. Yes, sir.

Q. Does it work away from or towards the rocks?

A. It works away from them.

Q. The east channel, which way does that set—the ebb tide?

A. It sets to the east, away from the rocks.

Q. Which is the wider of these two channels?

A. I should think the west channel was a little the widest.

Q. How about the west shore; what is the character of the west shore?

A. Well, it is all navigable around there.

Q. I mean the line of the west shore?

A. It is banks along the shore.

Q. How about the action of the wind there, if there is any?

A. If there is any wind there, if it is a west wind the boats keep on west——

Mr. Hyland: He don't ask about boats.

Witness: It keeps to the west bank.

Q. Are they then protected?

A. They are. They run close in on the west.

Q. I put into your hands Libellants' Exhibit 1, of this date, and ask you what you have to say about that, as to the island and the ledges of rock above. (Said exhibit shown witness.)

A. Well, I should think that was nearly right there.

Q. You think that is pretty fair?

A. Yes, sir; only there isn't quite enough rocks in it.

Q. The location, the lay of it, you believe is fair?

A. Yes, sir.

Q. Now suppose a canal-boat becomes helpless while she is coming down the river; is in the west channel, and about midway of the west channel, and when she is six or seven hundred feet, more or less, above these rocks she becomes helpless, which way would an ebb tide carry her?

A. It would carry her away from the rocks.

189 Q. It would carry her away from the rocks?

A. Yes, sir.

Q. Are you absolutely sure of that?

A. Yes, sir.

Q. If she was in a condition to drift, how must she drift in the west channel?

A. She would drift towards the west—away from the rocks.

Q. On the other hand, if she was in the east channel which way would she drift?

A. She would go to the east of the rocks.

Q. Are you perfectly sure of that?

A. Yes, sir.

Q. Do you know anything about the circumstances of this collision?

A. No, sir; I don't, only I see her there the night she run on.

Q. How late in the night?

A. I think it was between eleven and twelve o'clock.

Q. Then you saw her soon after she went on?

A. Yes, sir; I saw her on there; the steam canal-boat with her there at the time.

Q. On that diagram indicate the rock where you saw her.

Mr. Hyland: I object until he indicates the rock itself, in the first place.

Q. Indicate the rock where you saw her, if you can do so.

Objected to.

Q. Is it the same rock that is marked by Mr. Weed?

A. Well, I should think it was; nearly that, as near as I can tell.

Q. Then let me ask you were there other rocks around this one where you saw the boat Worden?

A. Yes, sir.

Q. On which side of this one where you saw the boat Worden?

A. On the west side.

Q. On the west of it?

A. Yes, sir.

Q. Were there any rocks above it?

A. Yes, sir.

Q. How far above it?

A. There is a big high rock probably a couple of hundred feet up.

190 Q. Above it?

A. Probably not so far; I couldn't tell you exactly; and then there is a smaller one.

Q. Was she bows on or sideways?

A. She was bow on—that is, she laid kind of this way (witness indicating)—kinder off the southwest; she laid bows on the rocks.

Q. Now, in coming down the river, how could she have got on there—I mean, in coming down the river did she get on there bow on or sideways?

A. She must have got bow on.

Q. State, if you can, whether it is possible that that boat drifted onto the rock where you saw her on an ebb tide from the west channel.

A. I don't think she could get there; couldn't possibly get there.

Q. She couldn't possibly get there?

A. No, sir; she could not get on that rock, because she would hit other rocks before she got there.

Q. How about the tide?

A. The tide would not let her go on.

Q. It would not let her go on?

A. No, sir; you couldn't get anything to drift on there.

Q. Where you saw her?

A. Yes.

Q. State, if you remember, what the wind was that night.

A. There was a very light, little west wind—light breeze.

Q. A light breeze?

A. Just a little ripple on the water.

Q. That was all?

A. Yes, sir.

Q. Sure of that?

A. I know it.

Q. You were asked, were you not, to make an affidavit of those facts very soon after the collision?

A. Yes.

Q. Wasn't your attention called to the matter very soon after the collision or some time after?

A. No; I don't think it was.

Q. Weren't you brought down here a year ago to court to testify?

A. No, sir; this is the first time.

Q. You are positive about the wind?

A. Yes, sir.

191 Q. What was the state of the tide there at the time you saw the boat between eleven and twelve?

A. It was over half down.

Q. It was more than half down?

A. Yes, sir; we were going out to fish then—to throw out our nets.

Q. And you got out on that tide?

A. Yes, sir; we rowed right across there, and that is the way we happened to see her.

Q. Do you remember what cargo was on her?

A. They said it was wheat; I don't know; I guess it was.

Q. Where was the Sydney lying when you saw the word Worden?

A. She lay right astern of her.

Q. And hitched fast to her?

A. I don't know whether she was hitched or not; her wheel was going.

Q. Her wheel was going?

A. Yes, sir; she had steam on or else the wheel wouldn't turn.

Q. How was the wheel turning—how fast or how strong?

A. I don't know exactly how it was; I know it was working.

Q. Working?

A. Yes, sir.

Q. How long did you see the wheel working?

A. We went right along to put out the nets and didn't pay any more attention to her; we knew she had steam up, and the wheel was working, and we went along.

Q. And that was after the collision?

A. Yes.

Q. How long after the collision?

A. I don't know what time she run on, for my part; I don't know what time that night she got on.

Q. Must it have been before you started from the shore?

A. Oh, yes; she must have got on before we started from the shore.

Q. And at what time did you start from the shore?

A. I think about half past eleven or somewhere near twelve—at the time the tide comes, you know.

Q. When did you pass them again that night?

192 A. We did not pass them at all that night. When we get our nets put out we go down towards Hyde Park; so we rowed up the lee shore and didn't pass them.

Q. Did you hear any noise on the steamer; and, if so, of what sort?

A. She had steam on; we heard puffing off.

Q. Exhausting or blowing off?

A. Something like that. I don't know what she was doing, but she had steam on. I don't know whether she was exhausting or what.

Q. Did she seem to be trying to haul the Worden off?

A. No; she didn't appear to be; she appeared to be lying there.

Q. She appeared to lay right there?

A. Yes.

Q. The City of Sydney?

A. Yes—I don't know what her name was.

Q. How far on did the Worden lie?

A. I think she laid very nearly half her length—maybe not quite so far.

Q. Was there any freshet in the river?

A. No, sir.

Q. Are you sure of that?

A. I am pretty certain of that; yes, sir.

Q. How strong was the tide—a strong or a very weak one—at that time?

A. Weak.

Cross-examination by Mr. Hyland:

—. Mr. Risley, how long have you resided near Esopus?

A. Well, I should think twenty-five or thirty years, and maybe longer—probably forty.

Q. You are a man of family?

A. Yes, sir.

Q. Your family live there?

A. At Staatsburgh; yes, sir.

Q. What has been your occupation for the last ten years?

A. Well, fishing and farming and painting and all such kind of work, you know.

Q. Do you own your place where you live?

A. Yes, sir.

193 Q. What kind of a place is it?

A. Well, it is a piece of ground with a house on it.

Q. How much ground?

A. Half an acre.

Q. What is your present occupation?

A. I am fisherman now.

Q. Have you been in any trouble since the last ten years?

A. I don't know that I have been ever in trouble; I have never been a witness before.

Q. You have never been a witness before?

A. No, sir.

Q. What day of the month was it that this boat ran on that rock?

A. Well, I think it was somewhere about the 28th or 29th—somewhere along there.

Q. When was your attention first called to this fact about this boat having run on these rocks and that you were to be a witness here?

A. That was somewhere along last March; I think it was.

Q. Last March?

A. Yes, sir.

Q. Is that the first time?

A. The first time.

Q. Who called your attention to the fact that you were to be a witness in this case then?

A. I guess Mr. Lyman or some such name as that; I don't know what his name is.

Q. Do you mean De Laney?

A. Yes; that was it.

Q. Where did he see you then?

A. Staatsburgh.

Q. Did you talk with him then about it?

A. Yes, sir.

Q. Was that the first time you talked with any one with reference to this suit?

A. Yes, sir.

Q. When were you subpœnaed to come here?

A. Yesterday.

Q. And who subpœnaed you?

A. I forget his name.

Q. De Laney?

A. Yes, sir.

Q. Where did he subpœna you?

A. At the fishing grounds where we were fishing.

194 Q. Where did you start from the night that you saw this boat that was on the rocks there?

A. We started from our fishing place.

Q. Where is that?

A. On the east side.

Q. Above or below this island?

A. Right opposite the rocks.

Q. Right opposite the rocks?

A. Yes, sir; right straight across to the west.

Q. What is the name of the place there?

A. Where we started from?

Q. Where you started from.

A. It is a place that Mr. Ford owns now.

Q. What is the place called just above that—just at the bend of the river?

A. That is what Mr. De Witt owns—the land above.

Q. Isn't there some place—Staatsburgh?

A. Staatsburgh is above.

Q. How far is that above?

A. I should think a mile and a half, probably, from where we were.

Q. How far is that from where you started that night to go fishing?

A. I told you we started from our fishing ground.

Q. How far is that from Staatsburgh?

A. I should think it is a mile and a half.

Q. Then you were down nearly opposite the island?

A. Yes, sir; right straight across.

Q. What time did you start out that evening?

A. I think it was probably half past eleven or twelve o'clock; somewhere along there.

Q. Who went out with you?

A. That gentleman there (witness indicating a man in court), Mr. Westervelt.

Q. Who else?

A. Me and him fishes together; that is all.

Q. How near that night did you go to this boat when you started out?

A. About the length of a boat—a small boat.

Q. Did you stop and hail anybody?

A. We didn't stop at all.

Q. Why didn't you?

A. We didn't know we had any business there and we had to go and fish.

Q. Didn't you know they were in difficulty?

195 A. We knew there was somebody there afloat that could attend to them.

Q. You didn't know how long they might float?

A. If she laid up like she did I didn't know but what she would float always.

Q. Why didn't you, as an act of humanity, say something to them?

A. Why didn't they say something to us? We went right along by and they saw us.

Q. You don't know that they saw you, do you?

A. I guess they could see us just as well as we could see them.

Q. You think they could see you in the small as well as you could see them?

A. We know it. We had lights in the boat.

Q. You had lights in the boat that they could see?

A. Yes; if they were on deck—and they were on deck.

Q. You didn't stop to help and render service to the men on the vessel?

A. We didn't think they wanted it.

Q. But you would not if they had?

A. Yes, we would; if they had stopped us we would, and if he wanted help he would have stopped us.

Q. You didn't volunteer?

A. I don't know as that is any great thing. We would have helped them.

Q. It doesn't look reasonable, if you were there, to pass them by in that position and not say a word or go to them or make any inquiries?

A. What is the use; what was the use of going there; would you go to help them if they didn't want it?

Q. Certainly not if they don't want it.

A. They stood on the deck; if they wanted help they would have said so.

Q. You passed by?

A. Yes; we went by about our business.

Q. Where did you go?

A. We went to float our nets on the west side of the island.

Q. How far from the island did you float your net?

A. About twenty-five or thirty feet.

196 Q. Twenty-five or thirty feet from the west side of the island?

A. Yes, sir.

Q. How far was that from the boat?

A. We were down probably two hundred yards; probably a little more.

Q. And you remained there with your nets how long?

A. Our net floats down and floats in the river.

Q. How far did you float down your nets?

A. I couldn't say how far we went that night; probably we went down a mile and a half.

Q. How long did you stay out that night?

A. I don't know how long we did stay out.

Q. When did you get home in the morning?

A. We don't keep any diary of that at all—of what time we get home in the morning. We drift until the tide is spent, and then we take our nets and go home.

Q. When you passed by you passed by on the north or upper side?

A. No, sir; we went on the south side.

Q. You went on the south side of the boat?

A. Yes, sir.

Q. Did you go between the boat and Esopus Island?

A. Yes, sir.

Q. I hand you a diagram marked Claimant's Exhibit 1, of this date, and I ask you if the outline as marked on that diagram is not nearer correct as to the east shore than the outline of libellants' exhibit (exhibit shown witness).

A. Well, I don't know.

Q. You ought to know; you live right on that shore.

A. I don't know whether it is more correct.

Q. They are very different, are they not?

Mr. McCarthy: One is curved and the other is straight.

Q. You observe that the line on libellants' exhibit is straight and that the line of claimant's exhibit is curved?

A. Yes.

197 Q. Which is nearer correct; you know that, you live right there?

A. Of course I live there.

Q. Which is nearer correct?

A. Well, I don't know.

Q. Which is nearer correct?

A. Well, let me see. I don't know but I just as lief take that as I would that one (witness pointing to both exhibits).

Q. They are very different?

A. It looks so.

Q. Can't you say which is nearer correct? Don't you know that that curve in the shore is a curved shore instead of a straight one?

A. It isn't exactly straight.

Q. Isn't it curved?

A. Yes.

Q. Isn't it curved in the general direction that the curve is marked on claimant's exhibit?

A. It may be curved, but I don't think quite so much.

Q. It may be curved, and it is curved in the general direction in which that draft is drawn, isn't it?

A. Well, yes, sir.

Q. I thought so.

A. Well, that is all right.

Q. Do you know where Esopus light is?

A. The light-house?

Q. The light-house; yes.

A. Yes, sir.

Q. On which side of Esopus light must a vessel go when coming down the river?

A. She is about two and a half miles away from there.

Q. On which side, east or west, of Esopus light does a vessel go, coming down?

A. Go both sides, just as the notion takes them, I suppose. They run both sides.

Q. What is that light-house there for?

A. They don't run——

Q. What is that light-house there for?

A. We are not talking about the light-house.

Q. I am talking about it.

A. The boats run to the east of the light.

Q. Do they run on both sides?

A. No.

Q. You said a moment ago that they did. What did you mean? You understand this?

A. Of course I do.

198 Q. Then what did you mean when you said they go on both sides of the light?

A. I didn't mean to say they ever went on both sides.

Q. Then that was wrong?

A. Yes, sir.

Q. How far east must they go of that light-house?

A. They can go as far as they want to.

Q. How far must they go in order to go safely?

A. They wouldn't dare to run over fifty yards, likely, or less—maybe twenty-five yards—to clear the light.

Q. Twenty-five rods or yards?

A. Yards.

Q. How much farther east on a line is Esopus Island than that light-house?

A. I don't think it is any further east.

Q. You don't think the island is any further east than the light-house?

A. No, sir; pretty near in a straight line.

Q. Now, assume on Claimant's Exhibit 1 that a boat was coming down on the ebb tide and was two hundred yards east of Esopus light (counsel indicating a point on the map marked S, representing the Sydney), and then took a course to go west of Esopus Island and arrived at a point off Staatsburgh, which way would the current take the boat if the wind was blowing a strong breeze from the west?

A. A strong breeze from the west?

Q. Yes.

A. From the light-house?

Q. Read my question. (Question repeated.)

A. She would be apt to go to the east.

Q. Have you ever made any personal measurements as to the rock there—that reef?

A. No, sir.

Q. Do you know whether the reef is ever exposed at any state of the tide where the boat lay?

A. Yes.

Q. Did you ever see it exposed?

A. Yes.

Q. When?

A. Yesterday, and I see it every day.

Q. How far above or below where the boat lay—the rock that you saw exposed?

A. Oh, I should think it sticks up every half tide, very near.

199 Q. How far above or below where the boat lay?

A. The boat laid right on the rock.

Mr. McCarthy: He is referring to the rock on which he saw it.

Witness: Yes; the boat laid on the point of rock. There is a small rock somewhere on this—there is where it was (witness indicating on exhibit).

Q. Did you ever go to that boat after she went on the rocks?

A. Yes; that same spring.

Q. And how long after she went on the rock?

A. I was fishing there every day.

Q. Did you go on board her?

A. Yes.

Q. When?

A. I can't tell you when. It was in that time. As long as she laid there I was fishing there.

Q. How much water is there over the rocks at high tide there?

A. I don't know; I never measured it.

Q. Which side of the boat as she laid there, east or west, were the rocks the higher?

A. To the west.

Q. Where did the boat Sydney lay when you went by that night?

A. She laid there on that rock on the point of the island.

Q. On the point of the island?

Mr. McCarthy: He means the steamboat Sydney.

Q. The steamboat Sydney?

A. She laid right astern of the canal-boat.

Q. How far from the north end was the steamboat Sydney of this reef of rocks?

A. I should think she was probably two hundred yards.

Q. From the point of this reef of rocks how far was the stern of the Sydney?

A. There is a buoy there, and then there is a reef of rocks, and then there was——

Q. Which side of the buoy was it?

A. She was on the south side of the buoy.

200 Q. Was the Sydney fastened to the boat Worden when you went by?

A. I couldn't say whether she was or not.

Q. You were within a few yards?

A. I don't care if I was; I wouldn't know whether she was fast or not.

Q. Do you know whether they were coupled together or not?

A. No, sir.

Q. Didn't you look at them?

A. Of course I looked; but I don't know whether they were coupled together or tied together or how they were or anything about it.

Q. Did you see the wreckers when they took that boat off the rocks?

A. I see them working there.

Q. Did you ever go there when they were there?

A. No, sir; I was not there then.

Q. Did you ever make any measurements around the rocks there?

A. No, sir.

Q. Were you ever on the rocks themselves at all?

A. Yes, sir; I have been on the rocks there fishing.

Q. When?

A. I can't tell you exactly when.

Q. How do you recollect that the wind was not blowing from the west that night?

A. Because I know we were fishing.

Q. Did you ever fish when the wind did blow from the west?

A. Yes, sir.

Q. How do you recollect this time and say it did not blow that night?

A. I didn't say it did not blow. I say a slight breeze from the west.

Q. How do you know?

A. Because I know.

Q. How?

A. Because I know that.

Q. Can you recollect any other night when the wind blew two years ago?

A. I don't know as I can.

Q. How can you recollect that night?

A. Because I know it.

Q. How?

A. Well, if the wind hadn't blowed I wouldn't know whether there was any wind at all or not, would I?

201 Q. Certainly not. Do you know whether it was that night or some other night that the wind blew?

A. Yes; I know it was that night.

Q. Will you tell me how the wind blew the night before?

A. No; I can't.

Q. Will you state how the wind blew the night before that?

A. No, sir.

Q. Will you tell me how the wind blew the night following?

A. No, sir. I wouldn't tell you how it blew last night, either.

Q. You couldn't tell me how it blew last night?

A. No, sir.

Q. You don't know?

A. No, sir; I was asleep and I didn't fish.

Q. Will you tell me how the wind blew on any night at all, except this night, two years ago?

A. I didn't keep any account of it.

Q. You didn't keep any account of that?

A. No, sir; I know the wind was west—just a little, light breeze.

Q. How do you know? Can you give any reason for it?

A. I suppose if the wind hadn't blowed it ain't likely there had been any wind.

Q. Can you give any better reason than that?

A. No, sir.

Q. Why, you remember that the wind did blow that night?

A. No, sir.

Q. Didn't you remember it on account of the boat being there?

A. No, sir; I didn't expect to be a witness.

Q. I didn't ask you that. Isn't that the reason you remembered it—because the boat was on the rock that night?

A. I don't remember anything about it.

Q. You don't remember anything about that?

A. No, sir.

Q. Did you ever observe there how a floating object would move on the waters at an ebb tide and when the wind was west above the Island?

A. It would go to the east.

Q. It would go to the east?

A. Yes, sir.

202 Q. Can you give any other explanation than that which you have given why you did not go to the assistance of that boat when you went by?

A. No, sir; if they had called to us we would have stopped and helped them if they wanted any help; that is all.

Q. You have no other reason than that?

A. No; we had no business there; and if they had said the word we would have stopped and helped them, of course.

Q. You knew that the boat was sinking when you went by, didn't you?

A. I didn't know she was sinking, or what she was doing.

Q. You didn't know what she was doing?

A. No; she was on the mud or rocks.

Q. Do you know whether she was on the mud or rocks?

A. She was on the rocks.

Q. How do you know that?

A. Because I see that.

Q. When—afterwards?

A. Yes, sir.

Q. You didn't know it that night when you went by?

A. No, sir.

Q. You didn't know it then?

A. I didn't know she was.

Q. Did you think she was?

A. I didn't know.

Q. Did you know she was?

A. No, sir.

Q. Did you know as matter of fact that she was on the rock when you went by?

A. She must have been on.

Q. If she must have been on the rocks, why didn't you see her on the rocks when you went by?

A. How did she get on?

Q. If she must have been on the rocks, why didn't you think she was on the rocks when you went by?

A. I said she was on the mud or the rocks.

Q. When did you first come to that conclusion that she was on the mud or rocks?

A. I came to the conclusion that night she was aground there.

Q. A moment ago you said you didn't when you went by?

A. No, sir; I didn't say so.

203 Q. You said you didn't think she was aground when you went by?

A. No, sir; I didn't.

Q. You didn't say that?

A. No, sir; I don't think I did.

Q. Is that as good as your recollection is?

A. About; yes.

Q. Will you swear now, as you went by, whether you thought she was aground or not?

A. Yes; she was aground; yes, sir; you might as well call it aground, as she lay on the rocks.

Q. Can you now swear it was either rock or mud where she lay that night?

A. It was rock.

Q. A moment ago I asked you——

A. (Witness interrupting.) You asked me that night if I knew it was mud or rocks, and I said I didn't know.

Q. You didn't know that night?

A. No, sir.

Q. Do you know there was any mud that she could run on?

A. Yes, sir; there is mud.

Q. There is no mud where there is no rocks?

A. There may be rock under it; I didn't say anything about that.

Redirect examination:

Q. How far is your boat landing from this ledge of rocks?

A. Where we hang out?

Q. Yes; right across from where your boat started?

A. It ain't half a mile; it is about a quarter of a mile.

Q. Now, is there any kind of a west wind that could have blown that boat on the rock where you saw her?

A. No, sir.

Q. No kind of a west wind?

A. No, sir.

Q. Whether big or little?

A. No, sir.

Q. Strong or high?

A. No, sir.

Recross-examination:

Q. When you passed by that night you did not think she was in any danger, did you?

A. No; not in particular, I didn't.

The signature of the witness is waived.

204 Daniel Terpenning, called on behalf of libellants, being duly sworn, testifies as follows:

Direct examination by Mr. McCarthy:

Q. Where do you reside?

A. Staatsburgh; I live part of the time there and part of the time on an island about two miles below there.

Q. Esopus?

A. About half way between Staatsburgh and Hyde Park. I live there about three months in the year.

Q. How old are you?

A. About fifty-five or fifty-six.

Q. What is your business?

A. Fishing.

Q. How long have you been fishing in the river at and about Esopus Island?

A. About thirty-eight or thirty-nine years, I think.

Q. Do you know the river there and currents?

A. I think I ought to know it pretty well.

Q. Do you know it?

A. Yes.

Q. Do you know it thoroughly?

A. Yes, sir.

Q. This Esopus Island is about how far out in the river? What is its distance from the east shore?

A. It is about half a mile from the east and a little over half from the west.

Q. How far below Esopus light is it?

A. It is about two miles and a half, very near.

Q. And this ledge of rocks that extends to the north of the island. How far above the island does the ledge of rocks go?

A. Probably three hundred yards.

Q. What is the character of that ledge?

A. It is two rocks, and it is out of the water most of the time; at high tide they are covered—very high tide.

Q. And are there other rocks?

A. There are other rocks there—that at low tide—there is a good many of them out of the water—lots of them sticking out of the
water between the lower one and the main land; you can't
205 hardly go through there with a small boat in low water between those.

Q. You mean to say it is a broken ledge of rocks?

A. Yes.

Q. Some of which are out of the water at high tide?

A. Some.

Q. Did you see the canal-boat Worden on one of these rocks?

A. I did.

Q. Now, the rock she was on. Describe its location. How did it lie with regard to the other rocks?

A. It lay in this way (witness indicating), from the south to the north.

Q. Were the rocks on the west side of it?

A. Oh, yes, sir; there were rocks on the west side, I suppose two feet higher than the one she lay on—maybe fifteen or twenty yards further west.

Q. And rocks, where else?

A. South and all around.

Q. Any to the north of her?

A. Yes; northwest.

Q. How far to the northwest?

A. Probably a hundred yards.

Q. And is it a substantially correct diagram (counsel referring to libellants' exhibit of this date)?

A. There ain't that curve in that island (witness indicating); these rocks run almost straight from the island—about straight north.

Q. Is it a substantially correct view of the island and rocks with respect to their position?

A. Well, I should think it was pretty near, except this curve; there is too much curve there.

Q. To the shore line or the island?

A. The shore line or island?

Q. Yes; I don't ask which is the shore. I ask——

A. (Witness interrupting.) There is too much of a curve there.

Q. The shore line is too much of a curve?

A. Too much of a curve of the rocks of the island. This curve runs more straighter north (witness indicating).

206 Q. This curve you speak of is the shore line. I don't care about that.

A. The shore line on the east or west—which do you mean?

Q. East.

A. Oh, well; I asked if this was the east-shore bank or the island (witness indicating).

Q. Here is the island, and this is the east-shore bank (counsel indicating); here is the west-shore bank; here is the island, and here are the rocks above the island (counsel indicating). Now, is that substantially correct, taking that to be the island and these the rocks (counsel indicating)?

A. Well, I should think it was; but you ain't got this thing laid out in no kind of shape.

Q. But that is no consequence. I only want to get a general idea of it.

A. These rocks that this boat lay on—I stood on them the next day, and when she went off I stood on that same rock and fished out the wheat the next day.

Q. You stood on the rock?

A. I stood on the rock and fished out wheat that she lay on. I got out about 300 bushels of wheat after she went away.

Q. You did?

A. Yes, sir.

Q. How does the ebb tide run when four or five hundred feet or eight hundred feet above that ledge of rocks, or above the buoy?

A. The tide from the buoy south sets right east.

Q. Do you mean in both channels?

A. Oh, no.

Q. Be more explicit?

A. The other tide sets to the east, the west tide sets west, and the east sets east.

Q. You seem to say that the tide in the east channel from the buoy sets to the east.

A. Yes, sir.

Q. And the tide in the west channel from the buoy sets——

A. To the westward.

Q. How far is that buoy above the island?

A. Probably 400 yards.

Q. Four hundred yards?

A. There are two rocks. There is a rock about 150 and another about the same distance, and another above that—maybe four or five hundred yards, perhaps clear of the island. 207

Q. Take a boat and put her about in the middle of the west channel——

A. (Interrupting.) Middle of the west channel, you mean, or directly opposite the island. What do you mean?

Q. In the middle of the west channel, and also put her, say, about a quarter of a mile north or northwest of the buoy. Do you take me?

A. I understand you.

Q. She is northwest of the buoy about a quarter of a mile, so as to be about in the middle of the west channel, and the tide is ebb. Do you take it?

A. I understand.

Q. Now, suppose the boat becomes helpless and drifts, where will she drift?

A. She will go down the west channel.

Q. Could she possibly go on the rocks?

A. How could she?

Q. Can she go on the rocks?

A. No, sir.

Q. Suppose, on the other hand, she was in the east channel.

A. That is where she was——

Q. Don't answer my question until I put it.

Mr. McCarthy: I move to strike that out, and I withdraw the question.

Q. Suppose a boat is in the east channel, coming down the river, and is a quarter of a mile above the buoy, and then becomes helpless, how would she drift?

A. In the east channel, of course.

Q. Would she drift onto the rocks?

A. No, sir.

Q. Did you see this boat at the time of the collision or right after it?

A. I did that night, of course. Of course, I was——

Q. You did see her?

A. Yes, sir.

Q. About what time did you see her first in the evening?

A. About eleven o'clock in the evening.

Q. You saw her where she lay the next morning?

A. Yes, sir.

208 Q. Carefully?

A. Yes, sir; I was onto her.

Q. Now, could the ebb tide have brought the boat on that rock where you saw her?

A. No, sir; there was no ebb tide The ebb tide was spent.

Q. You are again jumping into answers to questions that I do not put to you.

Mr. McCarthy: I move to strike out that part of the answer that is not responsive to my question.

The Commissioner: I do not understand that I have any power to rule in these cases, either to sustain objections or to strike out testimony on motion; but I instruct the witness to answer only such questions as are put to him.

Q. Could the ebb tide, assuming that it was half ebb when that boat became helpless—could the ebb tide have brought her onto the rock where you saw her?

A. No, sir.

Q. Are you sure of that?

A. I am sure.

Q. Do you remember how the wind was that night?

A. Yes, sir; I do.

Q. How was it?

A. It was a little inclined to the northwest; a light breeze.

Q. Suppose that a boat became helpless when she was four or five hundred feet, more or less, to the northwest of the rocks and in the west channel, could the ebb tide and the westerly wind have brought her onto the rock where you saw her?

A. No, sir.

Q. Would it have been impossible?

A. Well——

Q. Answer yes or no.

A. No, sir.

Q. It would not have been possible?

A. No, sir; it would not.

Q. Do you mean that it would have been possible or impossible?

A. Impossible for her to get there.

Q. How did she lie when you saw her—bows on or side on?

A. Headed southwest.

209 Q. Had she come on the rock bows on or side on?

A. Head on.

Q. Where were you before the collision?

A. I was about between a quarter and half a mile away from where she was on, watching the tide along shore.

Q. For what purpose?

A. To put out my net.

Q. Did you hear the noise that was made by the collision or——

Objected to.

Q. Did you hear any noise at or about that time?

A. Yes, sir; I did.

Q. What?

A. I heard a noise, and heard them hollering and talking there amongst themselves.

Q. Did you see any lights?

A. Yes.

Q. Go on and tell what you saw and what you heard which led you to suppose that there was a collision.

A. About the time the tide was going out for me to get out I see lights coming down east of the island, and I says to the boys that were with me——

Objected to.

Q. Go on.

Objected to.

A. I says, "There is a steam canaler or something else coming down this inside channel that is going to bother us about the time I want to throw." She was headed then right to the south, east of the island.

Q. What else?

A. I paid not much more attention to it, and pretty soon I looked up and I heard hollering, and I said, "I guess that boat is on the island or somewhere else." I put up the net, and then I see the boat back off from the other one and go along about her business. That was about twelve o'clock at night, I think that was.

Q. How far away from them were you when the Worden run on the rocks?

A. Between a half and a quarter of a mile.

Q. Where were you?

210 A. I was on the east shore, watching the tide. I knew then how the tide was when she run on.

Q. What was the character of the night?

A. You mean dark or foggy, or what?

Q. Yes.

A. It was a good night; it was not dark or foggy.

Q. A clear night?

A. A clear night.

Q. How was the tide at the time of the collision?

A. Just about low water off shore; it might have fell off half an inch after she was on.

Q. Did you hear what the hollering was for?

A. Not until next day; I went up there and was talking——

Q. When you got there the next day did you have any conversation with them?

A. I did with the man that was left on the boat.

Q. What did he say?

Objected to.

A. I was talking with him.

Q. What did he say?

Objected to.

A. I asked him how he came to go on there, and he said they drifted on; I said, "You are no boatman to tell me that you drifted on, because the tide would carry you along the other—it would carry you the other way."

Q. What did he say?

A. He said it did; he said it was to the west of the buoy; I said, "You are a damned liar."

Q. He said it was to the west of the buoy and it drifted down?

A. Yes; I said, "No; I know better than that, because the tide would carry it to the east."

Q. To the east or west?

A. To the east; he went on with a full head of steam.

Q. If he was to the west of the buoy would it work down?

A. He would have stayed to the west.

Q. What do you mean by saying the tide would have carried him to the east?

211 A. This man, when he told me about drifting on—I said, "You can't talk to me about drifting on there, because the

tide would carry you off to the east." I said, "You couldn't drift on the way you lay; common sense would teach any man better than that."

Q. Are the rocks to the westward of where he grounded higher or lower than where he lay?

A. The rocks are about a foot and a half or two foot higher than where she lay.

Q. How much was the Worden on?

A. She was about—bow on.

Q. She was bows on—about half way on?

A. At low water she was about half on.

Q. Did you hear the engine of the steamer worked at all?

Objected to as leading.

A. I did.

Q. What did you hear about the engine?

A. I heard them working the engine.

Q. How much?

A. Maybe half an hour.

Q. How was she working?

A. That I can't say—whether she was working ahead or back; that I can't tell.

Q. Can you tell whether she was working hard?

A. From the sound, she was—guessing from the sound of it.

Q. State whether there was any exhaust of steam or blowing of the escape.

A. I don't think there was, but I won't say that for certain.

Cross-examination by Mr. HYLAND:

Q. When were you subpœnaed?

A. Yesterday.

Q. When was your attention first called to the fact that you were going to be a witness in this case?

A. Two or three years ago.

Q. Two or three years ago?

A. Yes.

Q. Who did that?

A. You ask me too much; I forget the man's name now; I don't think I can remember his name.

Q. What man subpœnaed you yesterday?

212 A. This man that subpœnaed the other boys; I don't know his name.

Q. The same man that subpœnaed the others?

A. He didn't subpœna me; he left the subpœna at my house for me.

Q. Where do you live now?

A. I live on Shad Island.

Q. How long have you lived there?

A. I have lived there off and on for 25 years.

Q. You said you lived sometimes in another place. Where is that?

A. I do; Staatsburgh. Three months of the year I live at Shad Island; the rest of the time at Staatsburgh.

Q. You go there to fish?

A. I do.

Q. Have you ever been arrested?

A. What should I be arrested for?

Q. Have you ever been arrested?

A. What for?

Q. I don't ask you what for.

A. No, sir; I will tell you that plain enough. I have never been in jail or anywhere else.

Q. You have never been in jail?

A. No, sir; I had too good a father to be in jail; don't you forget it.

Q. Have you a family?

A. I have a family of eleven children; some of them older than you are.

Q. When did you first find out that there was any trouble with this boat?

A. The next morning when she laid on there.

Q. Is that the first you found out?

A. Wasn't that time enough?

Q. Was that the first time you found it out?

A. Yes, sir.

Q. What did you mean a moment ago in swearing that you saw them the night before there and in difficulty?

A. Well, I swore to what I meant and what I say now. I swore that I see them run on the rock.

Q. Didn't you swear a moment ago that you told your son that they were on the rock or somewhere there?

A. I did.

213 Q. You did know before the next morning there was some difficulty?

A. I didn't know the fact as I did the next morning when I went there, however, to see it. The next morning I took particular pains and rowed up there and see it.

Q. I hand you Claimant's Exhibit 1, of this date, and ask you if the outline on the east shore of this diagram is not more correct than the outline of the shore on the diagram — libellants' exhibit. (Said exhibit shown witness.)

A. Is that for the east shore or the east bank of the river or the east shore of the island (witness indicating)?

Q. That is the east bank of the river—that line (counsel indicating).

A. The east bank of the river?

Q. Yes; the east shore or bank of the river.

A. There is too much of a crook in it.

Q. Is the general direction of the crook more correct?

A. This is the west bank of the river (witness indicating).

Q. I am not asking about the west; I am asking about the east.

A. It is not right.

Q. Is the general direction of that line as to its curve correct?

A. No, sir.

Q. In what respect isn't it?

A. This is too short and this too crooked (witness indicating).

Q. What is too short?

A. This line here (witness indicating).

Q. The line from Staatsburgh to a point opposite the light-house is a little too short?

A. You ought to have your light-house on there. Where is your light-house (indicating)?

Q. I indicate to you a point marked the light-house. Do you know that light-house?

A. Oh, there! Now, you are getting at it; that is a horse of another color.

Q. Do you know that light-house?

A. Yes, sir; that is a horse of another color; that has nothing to do with Esopus Island at all; it is two miles and a half above.

Q. It is two miles and a half above it?

A. Yes, sir.

214 Q. On which side of the light do vessels go down the river?

A. Certainly they wouldn't go to the west. They go to the east, certainly, always.

Q. How far do they go west of that light when they go down?

A. They don't go west of it at all; they go to the east of it. If they have got legs and walk over the mud they could go to the westward; if they have not, of course they can't.

Q. You mean to say that vessels coming down the river to New York, going south, go east or west of that lighthouse?

A. I say they go east; they can't go west, because a man can walk ashore at low water. They go east of it.

Q. How far east can they go?

A. They can go half a mile east before they strike the first bank.

Q. How near can they go?

A. That light?

Q. Yes.

A. Fifty or sixty yards, I suppose; but they can't run on the rocks, though, at the same time.

Q. I indicate to you the figure marked S on the diagram as drawn opposite the light, representing the letter S, and I ask you if a vessel was off sixty yards from the light, east of the light, bound down the river or south, on an ebb tide, the wind blowing from the west, and taking a course to go to the west of Esopus Island and arrived on that course at a point off Staatsburgh, which way would she then be carried by the force of the tide and wind?

A. Well, it is only how the wind is.

Q. I have stated the wind blowing from the west.

A. If the vessel was coming down around the light?

(Question repeated.)

A. I want to know what the meaning of that S is. That is what I want to know. S stands for a good many things.

Q. S represents a vessel.

A. It does. That is something new to me. If that represents a vessel——

Q. Read the question to the witness. (Question repeated.)

A. I don't know what that S means. I want you to explain it to me. You may take it for one thing and I may take it for another.

215 Q. Again I repeat the question, and ask to have the question repeated to the witness. (Question repeated.)

A. How do you want the wind—northwest?

(Question repeated.)

A. What is the meaning of this (witness indicating)?

Q. That S represents a vessel—the steamboat Sydney, for example.

A. Then why don't you have the steamboat Sydney instead of S?

(Question repeated.)

A. Eastward, because the tide sets from the light-house right over to the east shore, and from the east point right over to the west again. That is the way it sets.

Q. Did you ever make any measurements of these rocks?

A. I did the next day, with my boots on.

Q. With your boots on?

A. Yes; got in and walked all around on the rocks.

Q. What measurements did you make?

A. From two, three, four, five, and six inches; maybe somewhere a foot.

Q. What measurements did you make?

A. I ain't going to get down to a quarter of an inch. I can't do that. Maybe from a foot to a foot and a half.

Q. What measurements did you make?

A. With my boots on, walking on the rocks, fishing out wheat. That is all the measurements I made.

Q. Do you understand my question?

A. I suppose I do.

Q. I ask you if you ever made any measurements as to that rock?

A. Only that way I did—going on the rocks and fishing out wheat.

Q. Then you didn't make any measurements, as a matter of fact, did you?

A. No; only that. I had no reason to—no occasion to. I fished out 400 bushels of wheat out of there the next day or two after she went down. It paid me pretty well.

Q. Did you see what became of the steamboat Sydney that night?

216 A. She backed off from the other boat. The next morning she went down the river—the Sydney—that is, the steamboat.

Q. Yes; did you see her back off?

A. Yes.

Q. What time did she back off?

A. It was about an hour, I should think, after she ran on.

Q. Where did she go after she backed off?

A. She backed off eastward, and I think, I wouldn't be certain, that she anchored; and the next morning, I believe, she went down the river. I saw a steamer going——

Q. Did you see her when she anchored that night?

A. I see her when she backed off two or three hundred yards eastward. Whether she anchored or not, of course I can't answer that.

Q. Where did you go that night?

A. I put out and went fishing.

Q. You didn't go out to the boats that night?

A. No, sir; I had something that would pay me better.

Q. Did you know that night when you saw her back off that there was some trouble about there?

A. I couldn't be positive there was, but from the looks of the lights I could see I supposed, of course, there was.

Q. You did suppose that night that there was trouble?

A. Yes, sir.

Q. Then a moment ago, when you said you didn't know there was trouble till the next morning, that was an error, was it?

A. I didn't say any such thing. I have said no such thing.

Q. How strong did the wind blow from the west that night?

A. It didn't blow strong enough to take a flag two feet square and blow it out straight.

Q. How do you remember about the wind?

A. Because I was out watching the tide, and if it had blowed I wouldn't be.

Q. What was the wind the night before that?

A. The night before it was southward.

Q. What was it the night before?

217 A. You might as well ask me the year before. I am not supposed to keep a diary for the year that way.

Q. When was your attention last called to the way that the wind blew that night?

A. That night?

Q. How many times have you thought of it since then?

A. Oh, I haven't dreamed about it much.

Q. I should presume not.

A. No, sir; I have not.

Q. It didn't interest you at all in any way?

A. No; it did when I got out wheat.

Q. Did it blow from the west when you were fishing out wheat?

A. I guess there was no wind at all when I fished out wheat. I happened to have good luck; there was no wind at all.

Q. How were those rocks at low tide—can you see them?

A. Yes, sir.

Q. What rocks can you see at low tide?

A. See the rocks that lay on the west and south of them.

Q. Can you see the rock that she lay on at low tide?

A. Yes, sir.

Q. What was the state of the tide when he got there?

A. Low water off shore.

Q. How do you suppose he got on the rocks at low water?

A. Run on with a full head of steam.

Q. When the tide was low you say the rocks could be seen that he run on?

A. Yes.

Q. And you say when he run on that night the tide was out—low?

A. It was dead low water.

Q. How do you suppose he got up on top of the rocks at dead low water?

A. With a good force of steam.

Q. Do you suppose he could have got on with a good force of steam?

A. Yes; why wouldn't he?

Q. If the rocks were bare and the boat was drawing six feet of water?

A. If you will let me tell you, I will explain it in half a minute.

Q. No; I don't want it.

218 Redirect examination:

Q. I will let you explain your last answer if you want to. What do you mean?

A. He was talking about getting on that rock without steam. Now, a boat certainly that was running at the rate of five or six miles an hour, he couldn't have got there. The rock he run on I stood on the next day and fished out wheat that run out of the bottom of the boat; that boat was higher out of the water at high water than if she had been floating in the river at high water, and at low water she was all out. I know I was there at high water and low water; I was there all the time when she lay there, and the wreckers told me——

Signature of witness waived.

John C. Westervelt, called on behalf of libellant, being duly sworn, testifies as follows:

Direct examination by Mr. McCarthy:

Q. Mr. Westervelt, where do you reside?

A. Staatsburgh.

Q. What is your age?

A. Thirty-eight.

Q. How long have you lived there?

A. Thirty-eight years.

Q. What is your business?

A. I am a fisherman in the spring and do other kinds of work at other times.

Q. How long have you been a fisherman?

A. Five or six years.

Q. Do you know about the set of the tides there?

A. Yes.

Q. Do you know the lay of Esopus Island and the rocks above?

A. Yes, sir.

Q. You do?

A. Yes, sir.

Q. Thoroughly acquainted with them?

A. Yes, sir.

Q. How far above the north end of that island do these rocks extend?

219 A. All we could see, I should think, were about four or five hundred yards.

Q. Where were you at the time this canal-boat Worden went on the rocks?

A. I don't know when she went on.

Q. You did not witness the collision?

A. No, sir.

Q. Did you see her after she went on?

A. I did.

Q. Before she was hauled off?

A. Yes, sir.

Q. You saw the rock on which she ran?

A. Since then; yes sir.

Q. Now, I ask you if on the ebb tide she could by any possibility have drifted on that rock?

A. No, sir.

Q. You are sure of that?

A. She could not.

Q. That you are sure of?

A. Yes, sir.

Q. Could the west wind have taken her there?

A. No, sir.

Q. How does the ebb tide set from above that ledge of rocks?

A. It sets both east and west.

Q. And in the west channel does it set away from the rocks?

A. To the west; yes, sir.

Q. And in the east channel does it set away from the rocks?

A. To the east.

Q. Place a boat 500 or 600 feet above the buoy in either channel, west or east, and let her drift on an ebb tide, could she by any possibility have got drifted on that rock?

A. No, sir.

Q. State how other rocks lie in the neighborhood of this one.

A. There is quite a large rock about 200 feet from the island, and about 200 or 300 feet more is another rock, that is out of the water the most of the time; in between these two rocks are several rocks that are a little higher than the rock where the boat was.

Q. There are, then, rocks to the westward of her and to the northwestward of her?

Objected to as leading.

A. Yes, sir.

220 Q. How much to the north and northwest of her is the buoy, to the northwestward of where you saw her?

A. Probably 300 feet.

Q. To the northwest of her?

A. Yes, sir.

Q. Suppose she was coming down the west channel, and when six, seven, or eight hundred feet to the northwest of the buoy she broke down and began to drift. Do you take me?

A. Yes.

Q. She is coming down the west channel; she is about in the middle of the west channel, and when five, six, or seven hundred feet northwestward of the buoy she breaks down; where will she drift?

A. She will drift to the west.

Q. Is it possible that she could have drifted on the rock where you saw her?

A. No, sir.

Q. Could any wind have blown her on the rock where you saw her on from the west channel?

A. No, sir.

Q. Are you positive of those facts?

A. I am.

Q. Was she bow on or sidewise on this rock?

A. She was bow on.

Q. About how much?

A. A little over one-third.

Cross-examination by Mr. HYLAND:

Q. Where do you live?

A. Staatsburgh.

Q. How long have you been a fisherman?

A. About five or six years.

Q. Have you always lived in Staatsburgh?

A. I have.

Q. Born there?

A. Yes, sir.

Q. You have never been in any difficulty?

A. No, sir.

Q. Did you ever make any measurements about those rocks?

A. I did not.

Q. When was your attention first called to the fact that you were going to be a witness in this case?

A. Yesterday.

Q. Have you thought of the case since it happened up to yesterday?

A. No, sir.

221 Q. You know how long ago it is since it happened?

A. Yes.

Q. When did it happen?

A. The 29th of May.

Q. What year?

A. 1883.

Q. Do you know the last witness on the stand?

A. Yes; Terpenning.

Q. When did you first see the boat on the rocks?

A. When we were nearly over to the island.

Q. When was that?

A. That was the same night she run on the rocks.

Q. Did you discover whether she was in trouble or not?

A. I supposed she was; not certain of it.

Q. How far away were you from her—the nearest point?

A. Between where the boat lay and the island.

Q. How far was it from the island to where the boat lay?

A. It might be 500 feet. I couldn't tell exactly.

Q. Do you think she was in trouble?

A. I thought she was.

Q. What trouble did you think she was in?

A. I thought she was aground.

Q. Did you observe what the steamboat did?

A. I heard her working the engine. I didn't pay any attention to what she was doing.

Q. Did you see what she did do afterwards?

A. No, sir.

Q. How long were you in that vicinity at that time so you could see the boats?

A. Maybe five minutes.

Q. Where were the boats when you first saw them? Were they over there then when you first saw them?

A. They were.

Q. What time did you start out that night?

A. About half past eleven.

Q. Did you see the boats when you started out?

A. Not as soon as we started out; no, sir.

Q. Were the boats going ahead when you started out?

A. I didn't see them when we started.

222 Q. When you first saw them they were going ahead?

A. I could not tell until I got near enough to see.

Q. When you first could tell were they moving or not?

A. Well, I don't know as I could tell whether they were or not.

Q. Then you didn't know whether they were in trouble or not?

A. I supposed they were.

Q. How did you suppose so when you didn't know whether they were moving or not?

A. I heard their engine going and supposed they were working it.

Q. And was it because they were working their engine or going and they were working it? Did that indicate to you that there was trouble of any kind?

A. I thought they were rather too close to the island to be out of trouble.

Q. You did think they were too close to the island?

A. Rather close. I was not certain.

Q. You were not certain?

A. Because I didn't go close enough to them to see.

Q. How close did you go to them?

A. They were, maybe, three or four hundred feet off the island, and we went between the boat and the island.

Q. Aren't you very familiar with the rocks there?

A. I am.

Q. You were within two or three hundred feet, and, being as familiar as you are with the rocks there, how is it you can't tell?

A. Not in the night time.

Q. Not in the night time?

A. No, sir.

Q. Did you ever go on that boat after she was on the rocks?

A. No, sir.

Q. Were you ever on her before that time or since?

A. I was very close to her the next day.

Q. How close were you to her the next day?

A. About three lengths of the boat.

Q. Did you see her after that?

A. I don't remember being close to her. I have seen her from the shore.

223 Q. You have seen her from the shore?

A. Yes.

Q. You never was on her?

A No, sir.

Q. You are familiar with the outline of the shores near Esopus Island, are you not?

A. Yes, sir.

—. I show you the diagram, marked Claimant's Exhibit, of this date, and I ask you, Is the line on this diagram indicating the east shore correct in its general curves and direction? (Said exhibit shown witness.)

A. No, sir.

Q. In what particular is it not?

A. There is too much of a curve here (witness indicating).

Q. There is too much of a curve at a point opposite——

A. Opposite the light-house, and this line here is straighter than that (witness indicating).

Q. This line from the point opposite the light-house down to Staatsburgh is straighter than the shore?

A. Yes, sir.

Q. Straighter than the shore?

A. Straighter than this (witness indicating).

Q. You mean the shore is straighter than that?

A. Yes.

Q. The shore is straighter than the line of the diagram from the point opposite the light-house down to Staatsburgh?

A. Yes, sir; and here is a creek that runs up here (witness indicating).

Q. And there is a creek below Staatsburgh entering the river?

A. Yes.

Q. It is pretty nearly correct in its general outlines? Do you say yes?

A. I say it is, with that exception that I make; yes.

Q. You know the light-house known as Esopus light, do you not?

A. Yes, sir.

Q. On which side of the light-house do vessels go going south—down the river?

A. They go on the east side, both north and south.

Q. How near can they go to that light-house with safety?

A. About fifty yards.

224 Q. Assuming a boat going south on the ebb tide, the wind blowing from the west, and going east of Esopus light, sixty yards, on a course to go west of Esopus Island, and arrives on that course at a point off Staatsburgh, which way would the tide and wind drift her?

A. Drift her to the east.

Q. Have you ever been on those rocks—that reef of rocks there—yourself?

A. Yes.

Q. What rocks have you been on there?

A. I have been on nearly all of them.

Q. How many of them?

A. All that are out of water. I never counted them.

Q. How many are out of the water?

A. I can't tell you exactly the number. There are several sticking up here and there all around.

Q. You have never had any occasion to examine those rocks as to how they lay or how far they are apart?

A. I have, to shove a boat off of them, quite often; yes.

Q. Can you state the distance between those several rocks that project above the water at low tide?

A. Above water at low tide?

Q. Can you state the distance between those several rocks which project above the water at low tide?

A. They all vary. I can't tell you the particular distance of each one.

Q. You never made any measurements there of any kind?

A. No, sir.

Q. Your attention has never been especially called to them?

A. No, sir.

Q. Your attention has never been especially called to the way in which the currents flow on a west wind and different states of the tide?

A. Yes, sir.

Q. Have you navigated the river with large vessels?

A. No, sir.

Q. You are not a pilot?

A. No, sir.

Q. You never have had any experience in navigation?

A. No, sir.

225 Redirect examination:

Q. How far is Staatsburgh from Esopus Island—how far north of the island?

A. I should think it was about a mile and a half.

Signature of the witness waived.

SAMUEL G. SMITH, called on behalf of libellants, being duly sworn, testified as follows:

Direct examination by Mr. McCARTHY:

Q. Mr. Smith, where do you reside?

A. In Newark, New Jersey.

Q. In May, 1883, and for two years subsequent to that time, for whom were you acting?

A. For the Canal Underwriters' Association.

Q. You were their manager in New York?

A. Yes, sir.

Q. Did you have to do with this Sydney loss?

A. Yes, sir.

Q. Do you remember having a conversation with a Mr. Hall, a boat-builder in Lockport, soon after he made repairs to the boiler or engine of the steamer City of Sydney?

A. I don't know how soon after. This accident happened in 1883, didn't it?

Q. In May, 1883—some time after.

A. Some time after that—it was in February, 1884.

Q. Where did the conversation occur?

A. At his place in Lockport.

Q. What did he say about the condition of the boiler of the City of Sydney at the time he repaired her?

Mr. HYLAND: Objected to. You mean Mr. Hall himself.

A. I hadn't any conversation with Mr. Hall—that is, in regard to——

Q. With whom did you have the conversation?

226 A. I had a conversation with either his foreman or his son.

Q. I supposed it was with Mr. Hall.

A. I had a conversation with him afterwards.

Q. Did you have a conversation with him at any time? I don't care what day in the year it was. Did you have a conversation with Mr. Hall?

A. I did.

Q. That is what I want to know. After he repaired this boiler and engine?

A. Yes.

Q. What did he say to you, if anything, about the dirt that was in the boiler and engine?

A. He said that the engine was very dirty—the boiler was very dirty.

Q. What else did he say?

A. He had taken out about two barrels of dirt out of the boiler.

Q. He said so?

A. Yes, sir.

Cross-examination by Mr. HYLAND:

Q. Mr. Smith, where did you have that conversation with Mr. Hall?

A. At his office at Lockport, New York. I think it was about February, 1884. I am not positive as to the date.

Q. What did you mean when you first stated that you did not have a conversation with him, but had with his son?

A. I had reference to my first conversation—the first.

Q. In February? You stated and put it in February. I ask you now what you meant when you said you did not have a conversation with Mr. Hall, but did have with his son or foreman.

A. I meant by that my first conversation I had with relation to the repairs to the boat.

Q. Did you have a conversation prior to that with him?

A. Not with him; no, sir.

Q. Did you ever have any other conversation with him except that one?

A. No, sir.

Q. When was that?

A. At that time.

Q. In February?

A. Yes, sir. I think it was February, 1884. I am not positive of the date.

227 Q. Did you have any trouble with this insurance company, the libellants in this action?

A. Have I what?

Q. Did you have any trouble with them?

A. I have had trouble with them—other people, too.

Q. Did you have any money difficulty with them?

A. I don't know as it is necessary to answer that question.

Q. I think it is.

A. All right.

Q. Will you please answer that question. What difficulty have you had with them?

A. Shall I answer?

Mr. McCARTHY: You can answer in any way you like—just as you feel about it.

A. I have had trouble with them; yes, sir.

Q. You have had some serious trouble with them, haven't you?

Objected to.

A. What do you mean by serious trouble?

Q. Do you know what serious trouble means?

A. I guess I do; just about as well as you do.

Q. And have you had any serious trouble with them with reference to money matters?

A. Not particularly serious; no.

Q. Then, what sort of trouble was it that you did have with them with reference to money matters?

A. I am not supposed to answer that question that I know of.

The same trouble you have, probably. Some people you owe money to and can't pay.

Q. Is that all there is to it?

A. That is all there is to it; yes; that I can swear to.

Signature of witness waived.

New York, *June* 3, 1886—3 o'clock p. m.

Hearing adjourned to June 5, 1886, at 1 o'clock p. m.

228 New York, *June* 5, 1886—1 o'clock p. m.

Hearing adjourned to June 12, 1886, at 12 m.

New York, *June* 12, 1886—12 o'clock m.

Hearing adjourned to June 19, 1886, at 11 a. m

New York, *June* 19, 1886—11 o'clock a. m.

Present: The commissioner, Mr. De Laney; Mr. Hyland; Mr. McCarthy subsequently appears.

Charles H. Buckalew, called on behalf of libellants, being duly sworn, testifies as follows:

Direct examination by Mr. De Laney:

Q. What is your business, Mr. Buckalew?

A. United States assistant inspector of steam vessels, port of New York.

Q. For how long a time?

A. Thirteen years, nearly.

Q. And what are you duties?

A. Inspection of steamboat boilers and machinery.

Q. Does that take in steam canal-boats?

A. Yes; when they come on the rivers.

Q. And during your experience you have examined boilers of steam canal-boats?

A. A good many of them; yes, sir.

Q. Do you know this canal-boat Sydney?

A. I cannot say that I do. I think I remember her, too; I am not sure.

Q. When a boiler is to be tested what is the proper test to give her to see if she is in good condition?

A. Fill the boiler entirely with water and then put on a pressure of one-half additional to what the steam is allowed. That is the regular test. That is the regular and proper test in this country—universal—that is, as far as the Government is concerned.

229 Q. Here is a steam canal-boat that was at a point on the Erie canal, and had her boiler washed out with the hose preparatory to coming down with cargo to New York, and the party has this boiler tested, as he terms it, by steam, and says this is the proper test; is it?

A. I do not think it is any test at all, except it might test for tightness. It is no test for strength—that is, not what we call a test. It is no test for safety, because if it does give out with steam it tears everything to pieces. If it gives out with water it does not.

Q. Suppose she gets further down the canal and arrives at Schenectady and the boiler commences to leak, and he continues on to Troy, about twenty-five miles further, and claims to have had his tubes simply expanded—the under tubes that go to the fire-box—he has the lower tubes expanded. He leaves there and goes down the river and gets to a point near Esopus. He says he observes steam coming out of the stack, and he looked into the peak-hole and he says, "Steam came out so I could not look into it. There was a flue bursted in the combustion chamber. It was working against the upper head and coming down the upper tubes." He says he found a crack, as I understand it, in this head two and a half inches wide. "The flue was cracked down from the top of the sheet about two inches--one flue." Now, if that was in existence when this man was in Troy having these repairs done and the proper test applied would that have shown?

Mr. HYLAND: I object to the question as involved, inconsistent, and not in accordance with the fact.

A. If it was in existence it could.

Mr. DE LANEY: I reserve the right to further examine the witness.

No cross-examination.

ROBERT SMITH, called on behalf of libellants, being duly sworn, testifies as follows:

230 Direct examination by Mr. DE LANEY:

Q. How old are you?
A. Forty-five years old.
Q. Where do you reside?
A. On an ice barge, the L. N. Shear.
Q. Where does she ply?
A. From New York to Barrytown.
Q. Where did you reside on May 29, 1883?
A. At what they call the Staatsburgh ice-house.
Q. Is that near Esopus Island?
A. About a mile above it.
Q. Are you acquainted with the channels and tides around Esopus Island?
A. I am.
Q. How long have you resided up there?
A. Since 1872.
Q. And were you connected with the ice-house there?
A. Yes.
Q. And you cut ice around there in that vicinity?
A. Yes, sir.
Q. And you have been connected with these ice barges going up and down the river between there and New York?
A. Yes.

Q. Do you recollect the circumstance of a steam canal-boat, having another boat in tow ahead, coming down the river about that point May 29, 1883?

A. I saw a steam canal-boat proceeding down the river and another one ahead shoving her up.

By Mr. HYLAND:

Q. When?

A. The 29th of May, 1863.

By Mr. DE LANEY:

Q. When?

A. I mean, 1883.

By Mr. HYLAND:

Q. What time?

A. I could not tell exactly; a little before eleven or after eleven, at night.

Q. And where were you when you observed them?

A. I stood on the dock of the Staatsburgh ice-house.

231 Q. You saw them how far above the island?

A. I should call it a mile.

Q. Just state what you saw—about her coming down, and so on.

A. What raised my attention, I was coming down the hill, and there was a Knickerbocker ice tow lay on the other side of the river, on the ebb tide. It was a clear night.

Q. Was there any wind that night to speak of?

A. No, sir.

Q. Was there any freshet?

A. I could not tell. I saw the steam canal-boat coming down the river the same time, about half ways across—a little more than half ways across.

Q. Which side of the river?

A. On the west side.

Q. Did you know about the rocks there at Esopus?

A. Yes, sir.

Q. Do you know how far they extend out from the island?

A. I should say, at low water, about 50 or 60 feet.

Q. They extend in what direction?

A. They run about south and north.

Q. State what you saw.

A. I saw the canal-boat coming down the river.

Q. About how far from these rocks when you saw her?

A. I should say right abreast of me, about a mile, where I stood on the dock. I stood right abreast in the river about a mile from the rock when I first saw her, where I stood. By abreast I mean across the river.

Q. You saw her coming down the river?

A. I saw a canal-boat.

Q. A steam canal-boat?

A. Yes.

Q. A steam canal-boat and this tow coming down the river?
A. Yes.
Q. How far had she got down when you lost sight of her?
A. When she was about one-third of the way—I did not look any farther—to the island.

232 By Mr. Hyland:

Q. Towards the rocks?
A. Towards the rocks.

By Mr. De Laney:

Q. Do you know how the tide was that night?
A. Yes; ebb tide.
Q. About this time?
A. About the time when I saw the boat.
Q. Do you know which channel is the widest there—the east or west?
A. The west channel.
Q. When abreast of you she was right across the river from where you were standing?
A. Yes, sir.
Q. How far up north of the rocks was she?
A. About a mile; about the same distance that I was myself.
Q. She was about a mile across?
A. No, sir; I say about a little more than half to the westward—a little over to the middle—a little more to the westward than she was to the eastward; I mean to say that the canal-boat was right abreast of me, facing to the east, half ways across the river, a mile from the rocks to the south'ard.
Q. And she went down about a third of mile further on the river.
A. Yes, sir.
Q. And then you lost sight of her?
A. Yes, sir—that is, I did not look at her.
Q. Going in the direction of the rocks—that is, going down towards the island?
A. The last I saw of her I could see her red light on the port side, which I ought not to.

Mr. Hyland: I move to strike out the answer as not responsive.

By Mr. McCarthy:

Q. Did you see the rocks she struck on?
A. I saw the rocks.
Q. Do you know where she struck?
A. No, sir.
Q. Did you see her after she struck on that rock?
233 A. No, sir; I was not near there; I only saw her from a mile distant.
Q. When how far distant?
A. About a mile.

Q. You know the place where she struck?
A. Yes, sir.
Q. Did you see her next morning as she lay there?
A. Yes, sir.

By Mr. HYLAND:

Q. A mile away?
A. A mile away.

By Mr. McCARTHY:

Q. Go on and tell what you know about the tides there—the ebb tide.

A. If a boat of any kind is in the main channel the tide would not set her on the rock; it would set her the other way—to the westward—in my opinion.

Q. Suppose a boat is coming down the west channel and is about midway in the west channel.

A. The tide would sweep her clear of that island.

Q. Take her which way?

A. Take her to the west of it.

Q. Suppose she is eight hundred feet to the northwest of the buoy when she gets helpless.

A. Eight hundred feet?

Q. Yes.

A. If the wind was blowing a northwest gale she would surely go on the rock.

Q. If it was blowing a gale?

A. If the wind was northwest and blowed hard; if calm weather she would not.

Q. Have your other answers been made with that question?

Objected to.

Q. How strong a gale has it got to be to blow her on the rock if she is in the middle of the west channel and the tide is running ebb?

Objected to.

A. I think if the wind blowed fourteen or fifteen miles an hour she might — blown on.

Q. A heavily loaded boat?

234 A. On the upper part. I thought you asked where would she strike.

Q. I will ask you another question. You are coming down the river, and you are in the middle of the west channel, the tide ebb. Now, suppose you break down when you are eight hundred feet to the northwest of the buoy, where will you go?

A. If it was a calm night and you were all right the tide would take the boat all right.

Q. Suppose it was not a calm night?

A. If the wind is to the northwest, was westerly, she may be blowed on the rock.

Q. How strong a wind; any kind of a wind?

A. What we call an ordinary storm.

Q. Do you know anything about what the wind was that night?

A. There was not much wind.

Q. Was there wind enough to blow her on the rock?

A. No, sir.

Cross-examination by Mr. Hyland:

Q. That was two or three years ago, wasn't it?

A. Yes, sir.

Q. Can you tell me how the wind blew the night before you saw that boat?

A. The night before I saw that boat?

Q. Yes.

A. No, sir.

Q. Can you tell me how the wind blew the night after you saw that boat?

A. No, sir.

Q. Can you tell me how the wind blew any night before or after the date of the night that you saw her?

A. I don't know as I could.

Q. Then why do you pretend to say here that you know that the wind did not blow very strong that night?

A. It was a very nice night, with no wind. If I am allowed to make the statement, I saw the Knickerbocker ice tow laying across that river on Pelham's dock—that dock was known as Pelham's dock—on an ebb tide, and a very nice night, not hardly any wind at all.

235 Q. How do you remember there not being much of a wind at all that night more than any other night?

A. I came to see a friend that night, coming down the hill, coming aboard the tow, and I had my family with me, and it was a very fine night.

Q. You remember that night, then, because you saw a friend?

A. I was out that night.

Q. Is that the only night you have been out?

A. No, sir.

Q. Do you remember any other night you were out?

A. Yes, sir.

Q. What was the weather any other night you were out?

A. I could not tell in all instances.

Q. You could not tell in all instances?

A. No, sir.

Q. And yet you pretend to tell here to-day, three years afterwards, about that particular night, and you cannot remember any other night. What do you mean by that?

The witness does not answer.

FRANCIS M. TRUDE, called on behalf of libellants, being duly sworn, testifies as follows:

Direct examination by Mr. McCARTHY:

Q. What is your occupation?

A. I follow the water for a living.

Q. How old are you?

A. I am fifty-four.

Q. Where do you live, Captain Trude?

A. I am living now on the barge Blanche, foot of West Seventeenth street.

Q. Do you know the steam canal-boat Sydney?

A. Yes, sir; perfectly well.

Q. Have you ever been in command of her?

A. Yes, sir.

Q. When?

A. I took her the 28th day of August, 1883, and got off her the 27th day of June, 1884.

Q. Do you know how she steers?

A. I do.

236 Q. Have you often navigated up and down the Hudson river?

A. For the last thirteen years I have been a pilot on the Hudson river.

Q. Do you know Esopus Island?

A. I do.

Q. How does the ebb tide run above the rocks on that island?

A. If a steamboat was in the proper course, where she ought to be, in midchannel, and the tide——

Mr. HYLAND: Answer the question.

A. It depends upon which channel you are taking.

Q. Never mind the channel at all. How does the ebb tide run when it reaches those rocks or before it reaches those rocks?

A. I should naturally think the tide would set to the westward.

Q. From actual experience do you know how the tide in the west channel sets?

A. I notice that my boat has always drifted to the westward.

Q. You know where the buoy is?

A. Yes, sir.

Q. Suppose a boat was coming down the west channel and when she is eight hundred feet to the northwest of the buoy she begins to drift, she is helpless, which way would she drift?

A. She would drift to the westward.

Q. Would she drift away from the rocks?

A. Yes, sir.

Q. If she is a loaded boat, having seven or eight thousand bushels of grain in her, what effect would the wind have on her?

A. It would have to be a pretty strong wind that would take any effect onto her.

Q. What do you mean by a pretty strong wind?

A. The wind would have to blow at least eight miles an hour to take any effect on a boat loaded six feet—a canal load on.

Q. Eight miles an hour there on the river?

A. Yes, sir; that is the best of my belief.

Q. What kind of wind do you call that?

A. I call that a good, strong wind. I do not call it a gale of wind.

237 Q. Suppose that with both the wind and tide she is drifting not more than at the rate of half a mile or a mile an hour.

Mr. Hyland: Objected to; that does not appear to be the fact.

Q. Answer it if you can. Suppose the wind is not strong enough to influence her more than a mile an hour, even with the help of the ebb tide, what kind of a wind do you call that?

Objected to.

A. I don't call that any wind at all hardly.

Q. Do you answer as you do from actual experience and actual knowledge of the tide around these rocks?

A. From my experience I answer. I answer from the experience I have had where I have always run.

Q. Suppose the Sydney was coming down and the Worden ahead of her this night—suppose there had been an anchor properly fastened on the bow of the Worden—an anchor fit for use—how long would it have taken to have fetched up these boats by throwing out the anchor—how far would she drift after the anchor had been thrown off before it fetched her up?

A. She might have drifted probably six hundred feet.

Q. Before the anchor would fetch her up?

A. Yes, sir; before it would hold her dead.

Q. How long would it take to heave the anchor and fetch her up?

A. If the anchor is in readiness you can anchor a boat in five minutes.

Q. And you think she would drift six hundred feet before the anchor would hold her?

A. It depends upon what kind of bottom it is.

Q. I don't know what the bottom is. It is the bottom there in the river above Esopus Island, several hundred feet. Do you know what the bottom is up there?

A. I don't know. I know what the shore is. Both shores are rocky. I cannot say about the bottom of the river.

238 Q. Do you frequently have occasion to bring these steamboats to anchor?

A. Not up in that part; I have never anchored but once above that part of the river; I have frequently anchored above here in the Highlands; not in the Highlands, but up along around Yonkers and this side of Yonkers.

Q. Do you know of anything to prevent anchoring there?

A. I do not.

Cross-examination by Mr. **Hyland**:

Q. Do you know how the river runs above Esopus Island—the outlines of the shores?

A. I don't know the course of it, because I have never had any occasion to use the compass on the Hudson river in my life, and I never saw any chart of the river that would give the courses.

Q. Do you know how the water runs above the island there—the current?

A. I will tell you how I know, Mr. Hyland; all I know is by experience; in coming down I try to keep as near the middle of the river as I can, and I have always found my boat drift to the westward there.

Q. Don't you know that there is a bend in the river above Esopus Island to the westward?

A. Yes, above the light.

Q. Don't you know that just above that there is a bend to the eastward?

A. Yes, right opposite Rondout, at Rhinebeck.

Q. Don't you know that when you get down to Esopus Island the east shore hollows out or hollows to the eastward?

A. I do, right above Staatsburgh.

Q. Don't you know, then, that the tendency of the current on the ebb tide for half a mile above Esopus Island is to run across the head of Esopus Island?

A. No, sir; I do not.

Q. (Claimant's Exhibit 1, for identification, shown witness.) Assuming a vessel at the point marked S, off three hundred yards from Esopus light, and on a course to take her to the west side
of Esopus Island; when the vessel arrives at a point on that
239 course, about half way between Esopus Island and the Esopus
light, assuming the wind blowing from the west and the
vessel to become entirely helpless, on an ebb tide, which way would she drift?

A. She would drift here to the westward.

Q. She would drift to the westward?

A. Yes, sir; that is the best of my experience.

Q. Have you ever seen a vessel drift on that line?

A. I have had them drift with me when they will naturally drift.

Q. Have you ever had vessels drift on that point?

A. I have not.

Q. Have you ever been cast adrift there at all?

A. I have never been cast adrift—no, sir; I have never been cast adrift there.

Hearing adjourned to Tuesday, June 22, 1886, at 11 o'clock a. m.

New York, *June* 22, 1886.

Present: The commissioner. Mr. McCarthy appears for libellants.

The counsel of claimant is not present, the reference having been delayed forty minutes for him.

WILLIAM ATKINSON, being duly sworn, testified as follows:

By Mr. McCARTHY:

My name is William Atkinson; I am 38 years old; I reside in Jersey City; my business is that of a submarine diver and wrecker in the service of the Baxter Wrecking Company.

Q. In what capacity?

A. As foreman of wrecking jobs—submarine diver.

240 Q. How long have you been a submarine diver and wrecker?

A. I have been wrecker 15 years, submarine diver 10.

Q. Do you know Esopus Island and the Hudson river round about Esopus Island?

A. Yes, sir; thoroughly.

Q. Who had charge of the rescue of the canal-boat Worden after she ran on certain rocks near Esopus Island?

A. I did.

Q. How many days after she ran on the rocks did you go there?

A. I went there on the third of June, I think; the 2d or 3d.

Q. Now, on what part of the rocks did you find her?

A. I found her on the north end of the island, west of the buoy—no, east of the buoy.

Q. About how far from the east side of the shore?

A. Something over a quarter of a mile.

Q. How far above the island itself?

A. About six to seven hundred feet.

Q. And about how far from the buoy?

A. I should say about three to four hundred feet from the buoy.

Q. How many days were you at work upon it?

A. Two.

Q. Did you have occasion to observe the tides and the running of the tides?

A. Yes, sir.

Q. Can you now speak about them?

A. Yes, sir.

Q. First tell me how this boat, the Worden, lay on the rock.

A. Head on.

Q. Are you able to say whether she must have gone on the rocks head on or sidewise?

A. Head on.

Q. You are sure of that?

A. Yes, sir.

Q. She must have gone head on?

A. Yes, sir.

Q. Couldn't have gone sidewise?

A. No, sir.

Q. Are you able to say whether she went on easy or hard by the way she lay?

A. She went on pretty hard.

Q. This rock where she lay on, is the top of it above water when the water is low?

A. No, sir; not quite.

241 Q. Not submerged completely at any time?

A. No, sir.

Q. How wide do you call the river there?

A. Well, three-quarters of a mile.

Q. Which is the wider, the east channel or the west channel?

A. The west.

Q. Answer this question, if you are able to: Suppose a boat like the Worden, held by a steam canal-boat, is going down through the west channel of the river, and about in the middle of the west channel, when she is seven or eight hundred feet northwest of the buoy, suppose she becomes helpless, how will she drift on the ebb tide?

A. Right straight down the river.

Q. State whether or not, on the ebb tide, she could drift on the rock where you found the Worden.

A. No, sir.

Q. She could not?

A. No, sir.

Q. Are you quite positive of that?

A. Yes.

Q. (Handing witness a paper.) Now, look at that exhibit and tell me whether the point which is marked there by the words "where boat was" is the rock on which you found—substantially, does it correctly show the rock on which you found the Worden?

A. Yes, sir.

Q. That is a pretty fair diagram?

A. That is a pretty fair diagram.

Witness has been shown "Libellants' Exhibit No. 1 of May 29, 1886."

Q. Now, what kind of a wind would it have to be to blow her there onto that rock?

A. It would have to be to the westward.

Q. How strong a wind?

A. From five to seven mile.

Q. Five to seven mile what?

A. To blow at the rate of five to seven miles.

Q. What do you mean by that—blowing the boat five to seven miles?

A. No; I mean that the wind is blowing with a velocity of five to seven miles.

242 Q. What effect would that have on the boat?

A. It would, of course, blow her to the eastward.

Q. How, upon these rocks?

A. Well, I don't think that it could — blowed her on these rocks.

Q. On the rock where you found her?

A. No, sir.

Q. Why?

A. She would have struck the rocks above—that is, on the bow—before she come across there.

Q. With what force would it have blown her on the rocks?

A. Well, blowed her out there pretty hard.

Q. What effect on the boat likely to have been produced?

A. Damaged to the bottom.

Q. Did you see anything of that sort exhibited?

A. No, sir.

Q. Now, this collision is said to have taken place about 12 o'clock I put into your hands (giving witness a pamphlet) tide tables of the Atlantic coast for the year 1883. Are you able by consulting these tide tables to state what the ebb tide was at or about Esopus Island at 12 o'clock on the night of May 29, 1883?

A. Yes, sir.

Q. Do so; mention the page from which you read.

A. I read from pages 44 and 121. It would be high water about 7.15.

Q. And what was it at 12 o'clock?

A. It would be about two-thirds low water.

Q. That is, it would be one-third from slack?

A. Yes, sir.

Q. Now, how fast a current would that be?

A. About half a mile.

Q. An hour?

A. Yes, sir.

Q. When the ebb tide is at its strength up there how fast is the current?

A. Mile and a half.

Q. An hour?

A. Yes, sir.

Q. You are quite sure about that?

A. Yes, sir.

Q. Now, you take a canal-boat that is being borne along—take two canal-boats—you know how these steam canal-boats are managed, one ahead of the other?

A. Yes, sir.

243 Q. Suppose they had an anchor and everything in readiness, how long would it take, when she is going on such a current as that—half a mile an hour—how far would she drift after her anchor had been cast before she would catch and fetch up?

A. She would drift not more than 150 feet at furthest.

Q. You are sure of that?

A. Yes, sir.

Q. At that place?

A. Yes, sir.

Q. That is a reasonable estimate, is it not?

A. Yes, sir.

Q. Very reasonable?

A. Yes, sir.

Q. (Handing witness a paper.) Look at this paper I put in your hand and say who drew that.

A. Well, I didn't draw it myself, but I ordered it drawed; it is drawed, this part—the rocks——

Q. You know what it is?

A. Yes, sir; that (indicating) is the shape of the boat as it lay on the rocks; that is about the way she headed; here would be the buoy off here; that is not marked.

Q. The buoy is to the north, is it not?

A. Northwest—that is, coming down the river.

Mr. McCarthy: Just mark north, east, south, and west there, and then mark the point of the buoy.

Witness marks on diagram as requested.

The diagram is then marked "Libellants' Exhibit No. 1, June 22, 1886."

The pages in the tide book referred to by the witness are marked "Libellants' Exhibit No. 2, June 22, 1886."

By the Commissioner: Mr. Hyland states that he has been engaged in arguing a motion before Judge Brown, and was not, therefore, present at the direct examination, but the testimony has been read over in the presence of the witness, and Mr. Hyland now proceeds to cross-examination.

244 Cross-examination by Mr. Hyland:

Q. Mr. Atkinson, what is your business now?

A. Submarine diver and wrecker.

Q. How long have you been following that business?

A. Fifteen years wrecker and about ten years submarine diver.

Q. Before that what was your business?

A. Clerk.

Q. For whom?

A. For Van Cleef.

Q. In what kind of business?

A. Grocery.

Q. Have you ever navigated any vessels?

A. No, sir.

Q. Have you ever navigated the Hudson river in any way?

A. Yes.

Q. How?

A. By being up there with pontoons and steamboats.

Q. You have always been up there on wreckers?

A. Yes, sir.

Q. And that is the only way you have navigated the river?

A. Yes, sir.

Q. Did you navigate a canal-boat?

A. Not to a large extent; some.

Q. Did you ever navigate a steam canal-boat?

A. No, sir.

Q. You never navigated any steamboat yourself as pilot or captain?

A. No, sir; not as a pilot or captain.

Q. Do you know anything about the currents—how the currents run above Esopus Island?

A. Yes, sir.

Q. How did you come to find that out?

A. By working there.

Q. When did you work there to find out?

A. Worked there on the Worden.

Q. When before?

A. Well, several different times before.

Q. When once?

A. I couldn't answer that question.

Q. Did you ever help to take a wreck off that island before?

A. No, sir; not on the island; above it.

245 Q. How far above it?

A. Off Staatsburgh.

Q. How far is that off Esopus Island?

A. Not more than a mile or mile and a half.

Q. What side of the river did you take wrecks off up there?

A. On the west side.

Q. When was that?

A. I couldn't tell you the year now. Let us see; no; I couldn't give you the year it was in; I can give you the month—April.

Q. Well, about what year?

A. About 1873, I think.

Q. Had you been up there between 1873 and 1883?

A. Yes, sir.

Q. Where?

—. About Rondout; all along there a number of times.

Q. What were you doing at Rondout?

A. Raising wrecks.

Q. What wreck did you raise there?

A. I raised a canal-boat.

Q. Have you ever before or since this time raised any wreck from Esopus Island?

A. No, sir.

Q. That was the first experience you ever had on that island?

A. Yes, sir.

Q. And you have had none since?

A. No, sir.

Q. How does that current set above that island on an ebb tide?

A. Sets right straight down the river.

Q. Have you ever had a vessel afloat there to ascertain that?

A. Did when I took this wreck off.

Q. What did you do when you took this wreck off to see that?

A. Put a chain under her and jacked her up.

Q. Did you at that time see any boat above the island coming down without being steered?

A. No, sir.

Q. Did you draw that diagram (Libellants' Exhibit 1)?

A. No, sir; I didn't draw it.

Q. Who drew it, if you know?

A. I showed them how to draw it.

246 Q. Whom did you show how to draw that?

A. Well, I couldn't tell you the gentleman's name.

Q. Some one in Mr. McCarthy's office?

A. Yes, sir.

Q. You swore in your testimony that the west channel was wider than the east, didn't you?

A. Yes, sir.

Q. Does that diagram indicate that the west channel is wider than than the east? Doesn't it indicate that the east is wider than the west?

A. Well, that would; yes.

Q. Is that diagram correct in that respect?

A. Well, no; not quite. Of course it is just drawn out rough.

Q. That diagram indicates that the outline of the east shore is almost a straight line, doesn't it?

A. Yes, sir.

Q. Is the east shore almost a straight line opposite Esopus Island?

A. Well, pretty near it; of course, some bend to it.

Q. Well, what kind of a bend to it?

A. Well, there is several different bends.

Q. Well, that diagram is not right, then, in accordance with the real outline of the shore?

A. It is not a perfect one.

Q. But you said it was very nearly correct, in your direct examination, a moment ago?

A. I don't know whether I did. I did the Island. I didn't have anything to do with the shore.

Q. Who did have to do with the shore if you did not?

A. Well, the gentleman that drew it, I suppose.

Q. Necessarily, didn't you show him how to draw the island as well as the shore?

A. No, sir; I just showed him where the island was.

Q. What do these lines above the head of the island, which come together at the point where the vessel is drawn, indicate?

A. Rocks.

Q. Then the boat Worden struck on the west side of the rocks, did she?

A. No, sir; on the east side.

247 Q. Does that indicate where the vessel struck on them? Is that where the Worden was?

A. Yes, sir.

Q. Is not that line upon which is the west line of the rocks at the head of Esopus Island?

A. There is more of them extends out here (indicating).

Q. Is that the line that indicates them?

A. Yes, sir.

Q. Then she came from the west side when she went on shore, did she not?

A. No; I shouldn't think so.

Q. How did she get on in that position?

A. Well, she went right head on; that is all I can tell.

Q. Then she was on the east side of the island, was she?

A. I can't tell you that, whether she was or not, when she came on there.

Q. Which side of the boat was damaged—the port or the starboard side?

A. The port side.

Q. The port side was damaged, and the boat was headed down the river, was she not?

A. Yes, sir.

Q. That indicates that when she came on the rocks the port side struck first?

A. No, sir; that did not. The rocks run right through all the way across under it.

Q. Was the plank broken on the starboard side?

A. The plank was not broke; no, sir.

Q. What was broken?

A. The bilge started.

Q. Was the bilge on the starboard side started?

A. No, sir.

Q. The bilge on the port side?

A. Yes, sir.

Q. Then that indicates that it was the port side struck hard?

A. No, sir.

Q. Why not?

A. The grain of the wood in that was what started the bilge; that is my opinion.

Q. Wasn't the bilge started by the rocks?

A. I couldn't say.

Q. Didn't you say in your direct examination that the boat went on hard?

A. Yes; she went on hard.

248 Q. What, then, do you say that she was not damaged by the rocks when she went on?

A. No, sir.

Q. What was her bilge damaged by?

A. I can't say whether it was the rocks or the——

Q. Do you know whether the bilge log was damaged or not?

A. No, sir.

Q. Did you see the bilge log?

A. I saw it after we put it on the dock.

Q. Then the grain swelling would not splice the bilge log?

A. No, sir; it would pull it apart. That would be all.

Q. What part of the port side of the Worden was damaged—how far from the bow?

A. About 25 feet.

Q. Aft of the bow?

A. Yes, sir.

Q. Do you know whether the west shore, opposite Esopus Island, is pretty nearly straight or is it a curve—a bend?

A. Pretty near straight there.

Q. Do you know where Esopus light is?

A. Yes, sir.

Q. Do you know how far the channel is outside or west of Esopus light?

A. Well, not positive about that.

Claimant's Exhibit for May 29, 1886, shown witness.

Q. Do these lines—this being Esopus Island—do these lines indicate how the shore runs there? See if that diagram does not indicate more correctly than Libellants' Exhibit No. 1 the outlines of the shore on both sides near Esopus Island.

A. Well, I should think that was very near.

Q. You think, on this exhibit, the outlines are very near correct?

A. Very near; yes. Of course, they may be a little bit—very near, I should judge.

Q. Assuming a vessel to be off Esopus light, as indicated by "S" in this exhibit, bound down, the tide ebb, and the wind blowing from the west, and, arriving at a point half way on her course to go to the west of the Esopus Island, between Esopus light 249 and Esopus Island, there she loses her power of self-control and is permitted to float, which way would the current carry her?

A. It would be just to the eastward, with the wind.

Q. How far do these rocks extend out beyond Esopus Island—that is, on the point?

A. About six or seven hundred feet, I should judge.

Q. Do they come to a point at the north?

A. Yes, sir.

Q. How far from that point was the Worden grounded?

A. About three hundred feet, I think.

Q. That is, three hundred feet south of that point—below it?

A. South; yes, sir.

Q. Does this diagram—Libellants' Exhibit 1, of June 22—indicate nearly correctly where the Worden was caught onto the rocks?

A. Yes, sir.

Q. These two lines beyond Esopus Island indicate the outlines of the rocks north of them—these two branch lines?

A. I don't understand that.

Q. These two branch lines indicate the outlines of the rocks that extend beyond the head of Esopus Island, do they not?

A. No, sir.

Q. What do they represent? A moment ago you said they did.

A. Well, I didn't understand it. That is the set of the tide. The gentleman who was drawing it just set the tide down there. I think that was what that represented.

Q. Do you know how these rocks are as to evenness?

A. Well, where she lay I do. I don't know as to others.

Q. That is all you know?

A. Yes, sir.

Q. How were they as to where she lay?

A. Well, they were pretty even. They were shelving rocks, of course, but they were pretty even.

Q. You didn't examine any other rocks except the one she lay on?

A. No, sir.

Q. And you say her port side was touching the rocks?

A. Both sides were touching the rocks all the way across there under her. She touched the rocks.

Q. To what extent did she lay on the rocks?

250 A. She laid—the rocks was under her where she lay on the rocks for about 25 feet from her bow.

Q. How far did they extend?

A. I didn't measure how far outside of her they extended, but they extended outside of her all the way across under her and ran away from her. I didn't measure how far.

Q. Ran which way away from her?

A. Well, ran northwest direction from her.

Q. How was it as to her stern?

A. Her stern lay all right; no rocks.

Q. No rocks under her stern either way?

A. Neither way.

Q. Did you examine her well enough to know whether she lay on rocks the whole width of her or not?

A. Yes, sir.

Q. Why is it that no part but her bilge was damaged then; do you know?

A. I couldn't tell you that; no, sir.

Q. As she lay with her whole width on rocks and the tide coming in and going out that would be likely to damage the whole width of her, wouldn't it?

A. Not more than she took when she first went on the rocks, she wouldn't.

Q. Were you there at extreme low tide?

A. Yes, sir.

Q. How much of the boat was out of water at extreme low tide?

A. Well, there was not, I shouldn't think, more than 18 inches of water at the rocks at low tide.

Q. On the rocks which she lay on?

A. Yes, sir.

Q. How much was her stern out of water when the tide was out?

A. The stern was not out more than 15 inches.

Q. And her bow was out the whole width of the boat?

A. Very nearly the whole width of the boat; yes.

Q. Did you ever try to anchor a canal-boat in the North River?

A. No, sir; not a canal-boat.

251 Q. Then why did you swear that you could anchor a boat in 150 feet?

A. I have anchored pontoons there.

Q. You have anchored your pontoon?

A. Yes, sir.

Q. Do you know how long it takes to cast anchor?

A. Well, according to how deep the water is, how the anchor is situated; well, cast one in about two seconds.

Q. Well, the boat might run four or five hundred feet before her anchor caught, might she not?

A. Well, she might run further than that if it took them 15 or 20 minutes to throw it.

Q. Suppose it didn't catch.

A. How do you mean; didn't touch on the bottom?

Q. Didn't catch on it.

A. If it didn't touch the bottom?

Q. Don't you know what "catch" means?

A. The minute it would touch the bottom it would catch.

Q. Is that your experience?

A. Well, I don't understand that.

Q. You don't understand that?

A. No; I don't get that right.

Q. What time did you say it was high tide on May 29, 1883?

A. Well, by the almanac—I am only giving you the tide by the almanac.

Q. Do you know anything about that almanac, whether it is right or not?

A. No, sir; I do not.

Q. Do you know how to figure up the time it is high tide at Esopus Island?

A. I do by the table it gives in the book.

Libellants' Exhibit 1, June 22, shown witness.

Q. Show by that book when it was high water on the 29th of May, 1883, in New York.

A. One hour and 42 minutes I see; one o'clock and 42 minutes.

Q. Was that day or night?

A. That is p. m.

252 Q. That is always p. m., isn't it? What does that mean—one o'clock at day or one o'clock at night?

A. P. m. means in the afternoon, of course.

Q. What was the state of the tide at the same time at Esopus Island?

A. Well, this book gives it.

Q. What does that book give?

A. About 7.15 at Esopus, I should say.

Q. Find that.

A. This book don't give Esopus; it gives Rondout. I should say about fifteen minutes' difference between Rondout and Esopus. This gives high water at 5.54. Then you have got to add one hour and 42 minutes—New York time—to it.

Q. Then what time would that make high tide?

A. That would make it at Rondout 7.36.

Q. Seven in the morning or in the afternoon?

A. In the afternoon.

Q. At that rate when would it be low time?

A. Well, it would be low tide near about two o'clock; that is my——

Q. About two o'clock in the morning?

A. Yes, sir.

Q. You stated that when the tide was entirely out a moment ago that then the bow of this boat that was on the rock was almost wholly out of water, didn't you?

A. Yes, sir.

Q. Well, that would indicate that when the boat ran on the rocks, as stated, the tide was out?

A. Well, I couldn't tell you that.

Q. It could not have been low water, could it?

A. I couldn't tell you that, for I couldn't tell how hard she ran out.

Q. She wouldn't run out of water five or six feet, would she?

A. She would have to go pretty hard if she did.

Q. Don't you think, if she ran out of water five or six feet, there would be more broken than her bilge log?

A. Well, I couldn't tell you that—of course not.

Q. Don't you know that at the time the boat ran on the rocks the tide could not have been nearly out?

253 A. Well, I couldn't tell you that. According to the time they say she ran on, and the tide, the tide must have been——

Q. Well, as I understand you, you say there were no rocks under the starboard side of the boat from the stern to the bow. The rocks were ahead of the boat, were they, and east of the boat, too?

A. I don't understand that right.

Q. You say that there were no rocks astern of the boat that you saw or observed?

A. There were no rocks under her stern; no, sir.

Q. And the rocks which she was on laid from the port side under her—that is, her starboard side?

A. All the way acrossed under her.

Q. And the boat was damaged only on the port side?

A. Well, I don't know how bad she was damaged on the other side. I know she was damaged on the port side. I didn't see her hauled out. I only see her at low water, where we put ashore.

Q. The damaged portion of the bilge was how far from the bow—you say twenty-five feet?

A. About twenty-five.

Q. Now, if the boat ran head on, how do you account for it that the bow was not damaged for 25 feet ahead of where the damage occurred?

A. The rocks was shelving rocks, and smooth on that side that the boat ran on.

Q. What side was that?

A. On the north side of the rocks.

Q. On the west side, you mean?

A. No; I mean the north side.

Q. The northwest side?

A. The north side of the rocks; and that side of the rocks was smooth; they were shelving rocks, like that (illustrating), and she ran over on them quite some ways.

Q. Wouldn't it damage the bows if she came on bow on?
A. No; I don't think it would.
Q. Why?
A. Because the rocks were pretty smooth.
Q. Suppose the bow went up and it carried the weight of the boat.
A. Yes, sir.
254 Q. Did you observe whether there was a rock ahead of the bow?
A. Yes, sir.
Q. How far ahead of the bow was the big rock?
A. Well, I couldn't say hardly how far; there was so many of them all ahead. These rocks were shelving rocks.
Q. Has your attention been called to the facts of this case before to-day?
A. Yes, sir.
Q. When?
A. I should judge about four or five weeks ago; somewhere along there.
Q. That is the first time your attention has been called to this since it happened?
A. Yes, sir.

At request of Mr. Hyland the witness signed the stenographic notes.

NEW YORK, *June* 24, 1886—11 o'clock a. m.

Hearing adjourned to 12.30 p. m. the same day.

NEW YORK, *June* 24, 1886—12.30 o'clock *a.* m.

Present: The commissioner, Mr. De Laney, Mr. Hyland, Mr. McCarthy.

JOHN J. ROWLAND, called on behalf of libellants, being duly sworn, testified as follows:

Direct examination by Mr. DE LANEY:

Q. Captain Rowland, what is your occupation?
A. Boatman.
Q. How long?
A. About twenty-five years.
Q. Up and down the Hudson river and the canals?
A. Yes.
Q. Have you had any experience with steam canal-boats?
A. Yes.
Q. How much experience have you had with them?
A. Five years.
Q. And what boat are you attached to now?
A. William Baxter.
Q. Is she a steam canal-boat?
A. Yes, sir.

255 Q. And I suppose with steam canal-boats you have been up and down the Hudson river quite often?

A. Yes, sir.

Q. Do you know where Esopus Island is?

A. Yes, sir.

Q. Do you know the rocks up there?

A. Well, I have seen them.

Q. You know there are rocks north of the island?

A. Yes.

Q. And are you acquainted with the tides up there about the island?

A. I can't say that I am much. I have never had any difficulty there.

Q. You never had any difficulty?

A. No.

Q. Do you know how it sets?

Mr. Hyland: What tide do you refer to—the flood tide or ebb tide?

Q. The ebb tide.

A. The ebb tide, I should judge, when it comes down there, it must strike pretty near the upper end of the island.

Q. There are two channels there?

A. Yes, sir.

Q. The east and west?

A. The eastern channel ain't used very often with boats.

Q. With steam canal-boats?

A. No, sir.

Q. Do you know the Sydney?

A. Yes.

Q. Do you know what kind of a boiler she has?

A. Yes, sir.

Q. Now, suppose you were coming down the river and were about thirty-five or forty rods north of these rocks; your steam suddenly goes down from seventy to twenty pounds; you have a consort with you; you are in the middle of the west channel; the wind is from the west, off shore; you are going in a west southwesterly direction, would you have drifted on the rocks there?

A. If you were north of the island I should think you would.

Q. Thirty-five or forty rods?

A. If you were there, and your boat not having any steam, it would naturally draw you that way. If he had his boat on the starboard side she would naturally drift that way.

Q. That is not what you told me before.

256 A. You ain't telling me now as you did before. You said she was on the west side of the island.

Q. In the middle of the west channel.

A. On the west side of the island. You say now on the north side of the island; you just said the north side.

Counsel: I said north of the rocks.

By Mr. McCarthy:

Q. I will amend the question. Put a boat in the middle of the west channel and northwest of the buoy, say eight hundred feet. Have you got that position in your mind?

A. Yes, sir.

Q. She is northwest of the buoy about eight hundred feet, and is in the middle of the west channel. She becomes helpless and drifts. Where will she drift?

Mr. Hyland: Objected to on the ground that where you now place the vessel there is only one channel.

Q. She is now in the middle of the west channel. She is eight hundred feet northwest of the buoy—about a quarter of a mile. The tide is ebb. She becomes helpless when she is a quarter of a mile northwest of the buoy. Where will she go on an ebb tide?

A. That is a pretty hard matter for me to tell—where she would go.

Q. Give us your best judgment; that is all we expect. If you are capable of giving an opinion do so. If you cannot give an answer say so, and we will proceed to another subject.

A. I cannot give an answer, because they are liable to take a sheer and go one way and are liable to take a sheer and go the other way.

Q. Where would the tide naturally carry you?

A. That I could not say—where the tide would naturally carry you?

Q. You don't know?

A. I do not.

257 Q. You don't know where the tide would actually carry her. Suppose you have an anchor in readiness to be cast off, and you are drifting with an ebb tide about half a mile an hour or a mile an hour. You cast off your anchor. How many feet would you drift before that anchor would fetch you up?

A. Sometimes it would fetch up right sudden.

Q. Take it where you were drifting.

A. Sometimes your anchor might catch hold and catch right up as soon as it struck the bottom. Then again it might go half a mile before it would catch.

Q. You cannot answer that question, then, either way?

A. I cannot. What experience I have had I have had my anchor catch right up, and sometimes it would go half a mile before I would have it so as to hook—to hang. I never anchored anywhere in the Hudson river.

Q. How long would it take you to anchor there if everything was in readiness?

A. To throw the anchor?

Q. How long would it take you to anchor and fetch up if everything was ready?

A. It would not take more than about half a minute to throw the anchor overboard.

Q. And fetch up?

A. It is according to how the anchor catched on the bottom.

Q. You are running a steam canal-boat now?
A. Yes, sir.
Q. How often ought the boilers of these canal-boats to be cleaned?
A. I generally clean mine once a trip.
Q. And how often test them?
A. Once a year.
Q. In what way?
A. The Government.
Q. By a hydrostatic test?
A. Yes, sir.

No cross-examination.

Charles A. Buckalew's direct examination resumed by Mr. McCarthy:

258 Q. I will ask you about these steam canal-boats—how often they ought to be subject to a test?
A. The law calls for once a year.
Q. Do you think for any reason that they ought to be as often as that?

Objected to.

Q. What kind of a test?
A. We put on hydrostatic pressure, one-half additional above the steam.
Q. Suppose there was no statute at all, what would be your opinion as to the frequency with which they ought to be subjected to the hydrostatic test?

Mr. Hyland: Objected to on the ground that this witness is not shown to be a special expert as to canal-boats. His business does not take him that way.

Q. You are the Government inspector of steam-boilers?
A. Yes, sir.
Q. Steamboat inspector?
A. Yes, sir.
Q. Go on and answer the question. What do you think about that?
A. I think it should be done at least once a year.
Q. What other, if there be any other, test is known to you that is at all satisfactory?
A. I don't know of any other test that would apply in that kind of a boiler.
Q. You know what kind of boilers these steam canal-boats have?
A. Yes, sir.
Q. You know the kind of a boiler that a man named Hall, in Lockport, makes?
A. I don't know anything about that; I could not say who makes the boiler, but I know the style of boiler that was here—an upright tubular boiler, made partially in sections.

Q. What is the tendency of these boilers of boats navigating the canal and Hudson river to get dirty?

Objected to.

A. I know nothing about the canal part of it.

259 Q. I was about to ask you when interrupted if you know any other test more satisfactory than the hydrostatic test?

A. I do not.

Q. There is not any?

A. I don't know of any other; for that class of boiler especially.

Q. Please tell us what the hydrostatic test is.

A. The boiler is filled entirely full of water and a pressure pump put on and the pressure forced up to one-half more than the steam allowed.

Q. What effect does the accumulation of dirt in a boiler have?

A. It is very apt, if it accumulates on a part exposed, to fire it—it is very apt to burn the iron or blister the iron.

Q. That leads the iron to do what?

A. It deteriorates, wears away, burns, cracks.

Q. It cracks?

A. Cracks.

Cross-examination by Mr. HYLAND:

Q. What would occasion a tube to burst in a boiler such as you have described, if you are acquainted with it, five feet away from the fire-box, in your opinion?

A. Well, that is a pretty hard thing to tell; it may be a general wear; it may be expansion and contraction; it may be grease collected on it, or mud collected on it.

Q. You think it might be grease or mud collected upon the tube?

A. Yes, it might be; sometimes the grease would gather.

Q. It is probable that it would?

A. I wouldn't be at all surprised if it did; of course I don't know

Q. You don't know?

A. I don't know what was there. I never was inside that boiler; but grease will accumulate at the upper part where the water line comes very often, and above the water line too.

It is understood that libellants now rest with the understanding that if the claimant desires to put in any more testimony a day shall be agreed upon between the parties and both parties will then
260 have the right to put in any further testimony that they desire on that day, when the thing then must be closed.

It is further understood that the case shall go over until the second Friday in September, when the circuit judge holds motion day, for a final hearing.

Libellants' counsel asks for the exhibits offered in evidence by him, that he may retain them himself. The commissioner delivers them accordingly with the consent of the other side.

Said exhibits are Libellants' Exhibits 1 and 2 of June 22d and Libellants' Exhibit 1 of May 29th.

Claimant's counsel takes possession of his exhibit.

261

Sixth.

The fifth finding of fact requested by claimant.

Claimant requested the court to find as follows:

Fifth. "In the spring of the year 1883, before the opening of navigation on the Erie canal, at Buffalo, New York, the libellants herein, through their said agents, Worthington & Sill, in accordance with a custom which had been carried out by the libellants for several successive years prior thereto, issued and delivered to H. Morse & Company, for the purpose of soliciting marine insurance risks, the open policy of insurance referred to by the learned judge in the first finding of fact, which policy of insurance is fully set forth in said fifth finding of fact submitted by claimant as aforesaid;" which the court refused to find or pass upon, except as already found, and to such refusal the claimant duly excepted in his first exception under exceptions to refusals to find.

The evidence in support of said finding is as set forth in the evidence above cited of Meadows, Morse, & Henry S. Sill.

Seventh.

The seventh finding of fact requested by claimant.

Claimant requested the court to find as follows:

Seventh. "Thereupon H. Morse & Co. applied in writing to Worthington & Sill, general agents of the libellants, to insure the said cargo of wheat on the boat 'William Worden,' a copy of which application is set forth in exhibit marked Claimant's Exhibit B, above.

On receipt of this application Messrs. Worthington & Sill, the libellants' general agents, issued and delivered to H. Morse
262 & Co. a certificate of insurance, also above set forth and marked Libellants' Exhibit No. 2.

The way and manner in which this insurance was made on the cargo of wheat is the way and manner in which it has been customary to insure cargoes of grain in the canal transportation business for the last twenty-five years, and in no case of loss to the owners has it appeared that the insurance company has claimed to be subrogated to the rights of the owners as against the carrier;" which the court refused to find or pass upon, except as already found or passed upon, and to such refusal to find claimant duly excepted in his second exception under exceptions to refusals to find. Said application and said certificate of insurance and the testimony hereinbefore set forth constitute the evidence in support of this proposed finding.

Eighth.

The eighth finding of fact requested by claimant.

Claimant requested the court to find as follows:

Eighth. "Thereupon H. Morse & Co. and Captain Charles E.

Wager signed the above set forth bill of lading and took the bill of lading and the above set forth certificate of insurance, which H. Morse & Co. endorsed in blank and pinned them together and delivered them thus pinned together to William Meadows, the above-named shipper, on receipt of the above-mentioned cargo of wheat on board the 'Worden.' There was no conversation between Morse & Co. and Meadows with reference to this particular insurance contract;" which the court refused to find or pass upon, except as already found or passed upon, and to such refusal the claimant duly excepted in the third exception to exceptions to refusals to find.

263 The evidence in support of this proposed finding is found in the testimony of Henry Sill, Henry Morse, and William Meadows, hereinbefore set forth, and in the said bill of lading and certificate of insurance hereinbefore set forth.

Ninth.

In the tenth finding of fact submitted in behalf of the claimant on the trial.

In the fourth exception under exceptions to refusals to find the claimant duly excepted to the refusal of the learned circuit judge to find the tenth finding of fact submitted on the trial, to wit: "When H. Morse & Company made application for the insurance of the cargo of wheat to be transported in the boat 'William Worden' they intended the insurance for the benefit of themselves and Charles E. Wager, the captain and owner of the boat 'William Worden,' and when Worthington & Sill, the libellants' general agents, issued the certificate of insurance on the said cargo to H. Morse & Company they intended to insure H. Morse & Company and Captain Charles E. Wager, the owner of the boat 'Worden.'" The evidence in support of this finding is the evidence hereinbefore quoted of H. Morse, Henry Sill, and William Meadows, and Exhibits A and 2.

Tenth.

In the twelfth finding of fact submitted in behalf of the claimant.

In the fifth exception to the refusals to find the claimant duly excepted to the refusal of the learned circuit judge to find the twelfth finding of fact requested by the claimant, to wit: "When Captain Wager arrived at Lockport he stopped said boat and caused 264 the boiler of the steamboat 'Sydney' to be thoroughly cleaned and then tested by the builder of it, and proceeded on his voyage until he arrived at Schenectady, when he discovered that the boiler commenced to leak. He ran the boat to Troy, and then stopped and had the boiler repaired, and again tested it and found it tight, and then proceeded on his voyage down the Hudson river." The evidence in support of this proposed finding is the testimony of the claimant, Charles E. Wager, Gordon W. Hall, and Robert Pinkerton, heretofore set forth, and of Riley, Buckalew, S. G. Smith, and Rowland, as also hereinbefore set forth.

Eleventh.

In the thirteenth finding of fact submitted in behalf of the claimant on the trial.

In the sixth exception to the refusal to find the claimant duly excepted to the refusal of the learned circuit judge to find the thirteenth finding of fact submitted on the trial, to wit: "The loss was paid under the said insurance policy voluntarily, and no mistake of facts or charge of fraud is alleged or proved." The evidence in support of this proposed finding is the libel and complaint and answer, and the receipt on the certificate of insurance, and all the exhibits and testimony set forth in this bill of exceptions above set forth.

Twelfth.

Exceptions to Conclusions of Law.

In the first conclusion of law.

The learned circuit judge finds, as a conclusion of law, that "the loss was sustained by reason of the negligent navigation of
265 those in charge of the 'Sidney;'" to which the claimant duly
excepted. The only evidence in support of this finding is the evidence above set forth on negligence, to wit: Wager, Hall, Pinkerton, Riley, Buckalew, Rowland, S. G. Smith, Inslee, Risley, Weed, Westervelt, and Terpening.

Thirteenth.

In the second conclusion of law.

The learned circuit judge finds as a conclusion of law that "the libellants are entitled to a decree in the sum of six thousand one hundred and seventy-five $\frac{89}{100}$ dollars, with interest from May 28th, 1883, with costs of this court and the district court;" to which the claimant duly excepted, as therein stated.

Fourteenth.

Exceptions to the Refusal to Find or Pass upon the Conclusions of Law Submitted by Claimant.

In the first conclusion of law proposed in behalf of claimant.

The claimant requested the learned court to find as a conclusion of law, first, "under the terms of the bill of lading H. Morse & Company and Charles E. Wager were carriers of the said cargo of wheat on the boat 'William Worden;'" which conclusion of law the learned court refused to find, to which the claimant duly excepted, as therein stated.

Fifteenth.

In the second conclusion of law submitted by the claimant.

The claimant requested the learned circuit judge to find as a conclusion of law, second, "the open policy of insurance and the certificate of insurance are to be read together as constituting the contract of insurance, and under their terms, read in the light of the bill 266 of lading to which the certificate was pinned, Armour, Plankinton & Company were insured as owners, H. Morse & Company as carriers and advancers, and Charles E. Wager as carrier;" which the court refused to find or pass upon, except as already found or passed upon, and to which the claimant duly excepted, as therein stated.

Sixteenth.

In the third conclusion of law submitted in behalf of the claimant.

The claimant requested the learned circuit judge to find as a conclusion of law, third, "that payment of the loss under said policy of insurance and said certificate of insurance to any one or more of the insured was for the benefit of all the insured, and no cause of action remains to any one of the insured against the others, and therefore no cause of action by subrogation to the insurance company could accrue against any one of the insured. In other words, there could be no subrogation;" which the learned court refused to find or pass upon, except as already found and passed upon, and to which refusal the claimant duly excepted, as therein stated.

Seventeenth.

In the fourth conclusion of law.

The claimant requested the learned court to find as a conclusion of law, fourth, "a voluntary settlement and payment of the loss under the insurance policy are binding and cannot be ripped up and set aside except upon allegations and proofs of such settlement and payment having been made under a mistake of fact, duress, 267 fraud, or some other legal ground. This rule applies to the immediate parties to the settlement and those in privity with them;" which the court refused to find, and to such refusal the claimant duly excepted, as therein stated.

Eighteenth.

In the fifth conclusion of law submitted in behalf of the claimant.

The claimant requested the learned court to find as a conclusion of law, fifth, "that the collision and loss aforesaid was not caused by want of ordinary care on the part of the person engaged in managing the boats "Sydney" and "William Worden;" which the court refused to find, and to which refusal the claimant duly excepted, as therein stated.

Nineteenth.

In the sixth conclusion of law submitted in behalf of the claimant.

The claimant requested the learned court to find as a conclusion of law, sixth, "the loss having been paid under the terms of the insurance policy, the libellants are estopped from bringing suit against the claimant for any loss which is admitted by the payment of the loss, without objections, to have accrued under the terms of the insurance policy;" which the court refused to find, and to which refusal the claimant duly excepted, as therein stated.

Twentieth.

In the seventh conclusion of law submitted by the claimant.

268 The claimant requested the learned court to find as a conclusion of law, seventh, "that the decree appealed from should be affirmed and a decree entered in favor of the claimant, with costs of this appeal and the costs of the court below;" which the court refused to find, and to which refusal the claimant duly excepted, as therein stated.

269 Counsel for the claimant thereupon proposed, on behalf of said claimant, the following findings of fact and conclusions of law to be found by the court, viz:

U. S. Circuit Court, S. D. of New York, Second Circuit.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY,
Libellant and Appellant,
against
THE STEAM CANAL-BOAT "SYDNEY" and THE CANAL-Boat "William Worden," &c., Charles E. Wager,
Claimant and Appellee.
} Findings.

The court is respectfully requested on behalf of the claimant to make the following

Findings of Fact.

I.

That on the 29th day of May, 1883, and for several months prior thereto Charles E. Wager, the claimant, was the sole owner of the steam canal-boat "Sydney," her engine, boiler, and tackle, and the canal-boat "William Worden."

270 II.

That at the various times herein mentioned H. Morse & Co. were engaged at Buffalo, N. Y., in the business of what is known as middlemen or canal brokers between the shippers of grain and other merchandise and canal-boat captains and owners in providing cargoes for boat captains and boats to take cargoes for shippers and owners.

III.

In May, 1883, William Meadows was engaged at Buffalo, N. Y., in the business of commission merchant, and as such shipped grain on canal-boats at Buffalo consigned to New York and other ports.

IV.

The libellants, The Providence Washington Insurance Company of Providence, Rhode Island, and The Security Insurance Company of New Haven, Connecticut, at the times herein mentioned were foreign corporations, but carrying on the business of general marine insurers in the State of New York, and at the times herein mentioned at Buffalo, N. Y., Worthington & Sill acted for them in said business as their duly authorized general agents.

V.

In the spring of the year 1883, before the opening of navigation on the Erie canal, at Buffalo, N. Y., the libellants herein, through their said agents, Worthington & Sill, in accordance with a custom which had been carried out by the libellants for several successive years prior thereto, issued and delivered to H. Morse & Co., 271 for the purpose of soliciting marine insurance risks, the open policy, "Claimant's Exhibit A," copy of which is as follows:

"*Uniform Canal Cargo Policy.*

The New England Underwriters,

The Security Insurance Co. of New Haven, Conn.,

The Providence Washington Ins. Co. of Providence, R. I.,

Each acting and contracting for itself and not one for the other, for the true performance of the premises, each company for its own part only, which is one-half of all liability accruing under this policy—

By this policy of insurance, on account of H. Morse & Co., for whom it may concern—

Do insure the several persons whose names are hereafter endorsed hereon as owner, advancer, or common carrier on goods, wares, merchandise, or country produce, on his own boats or boats belonging to others, loaded on commission or chartered—

From place to place, as endorsed hereon or in a book kept for that purpose, for the several amounts, at the rate, and on the goods, wares, merchandise, or country produce as specified in the said endorsement.

No risk considered as insured under this policy until said endorsement is approved and signed by these companies or their duly authorized agents at ——, unless with special agreement with the companies and endorsed thereon.

Beginning the adventure upon the goods, wares, merchandise, or country produce from and immediately following the lading 272 thereof at the port or place endorsed as aforesaid and continuing the same until the said goods, wares, merchandise, or country produce shall be safely landed at the port of destination as aforesaid; and it shall and may be lawful for the said boats to load in such a manner as is usual and customary for vessels employed in the navigation aforesaid to be laden without reference to any provisions on the same subject on marine law or custom applicable to vessels laden for sea voyages; five days allowed to discharge after arrival; no assurance to apply more than three days after lading while the boat is in port in which she is laden.

Touching the adventures and perils which the said insurance companies are contented to bear and take upon themselves on said trip or voyage, they are of the seas, canals, rivers, and fires and all other perils, losses, or misfortunes that shall come or happen to the hurt, detriment, or damage to the said goods, wares, merchandise, or country produce laden on board of said boats on the voyage or trip aforesaid, excepting perils, losses, and misfortunes arising from or caused by ice, jettison, theft, robbery, or barratry of the master or any of the crew of said boats, or from a want of ordinary care and skill (such as is common in said navigation) in lading or navigating said boats, and excepting also all losses arising from or caused by the said boats being unduly laden on the voyage or trip aforesaid.

It is hereby expressly understood and agreed that these companies will not be liable for loss or damage to any cargo during the loading of boat resulting from lack of proper caulking, nor for any loss or damage resulting from the spilling of cargo by careening of boat in consequence of carelessness or overloading.

Specie, bullion, jewels, bank notes or bills of exchange, deeds, bonds, mortgages, accounts, and all other evidences of debt, plate, medals, paintings, powder, piano-fortes, statuary, sculptures, and curiosities are not deemed to be included in any insurance unless specially mentioned in the policy and scheduled.

273 In case of loss or misfortune it shall be the duty of the captain and crew or those having command to use the utmost diligence and attention to save the property until some agent of these companies shall arrive, and upon his arrival to assist him in the care and saving of the property, and neglect to do so will render the policy void, and it is understood there can be no abandonment of the subject insured, nor shall the acts of the insurers or their agents in recovering, saving, or disposing of the property hereby insured be considered a waiver or an acceptance of abandonment, nor as affirming or denying any liability under this policy, but such acts shall be considered as done for the benefit of all concerned, without prejudice to the rights of either party.

Immediate notice of the occurrence of all losses shall be given to these companies by the insured, and within thirty days from the time the same may happen the said insured shall deliver to said companies as particular an account thereof as the nature of the case will admit, stating the causes, if known, the extent thereof, and the nature of the interest of assured in the property; also what other insurance or assurances (if any) there was on said property at time of said loss, which statement shall be in writing, signed by the assured, and verified by his or their oath; and so much of said statement as relates to the cause, nature, and extent of said loss or damage shall be verified also by the oath of the master of said boat or vessel, or of some other person or persons having immediate charge thereof at the time the same did happen, otherwise these companies will not be liable under this policy; and the amount of loss shall be ascertained by the opening of packages, when necessary, by a competent person and separating the sound from the damaged portion, these companies being liable for the loss on the damaged portion only, which shall be ascertained by appraisement by disinterested persons, or by sale at auction, as these companies may prefer.

The said loss or damage to be estimated according to the true and actual cash value of the said property at the place of destination on the day of the disaster, and on the property not forwarded to
274 its destination the said loss or damage to be ascertained in the same manner, and the freight from the place of the disaster to the place of destination deducted, and these companies will pay such proportion of the said loss as the amount hereby insured bears to the sound value of property so insured, to be paid within sixty days after notice and proof of the loss and interest thereon shall have been made by the insured. In all cases of loss or damage there shall be deducted, in lieu of average, the sum of seventy-five dollars on losses on grain and general merchandise, and fifty dollars on flour and other cargoes, excepting salt, on which the average shall be one hundred dollars.

In case of loss all unpaid premiums to be deducted.

In the case of wet grain the dry portion in the boat (if any) to be considered as a sample of the condition and quality of the cargo when shipped.

No claims to be paid for damage to cargo from leakage through the decks or other coverings of the boat. It is also agreed that these companies shall not be liable for any loss or damage to bar, bundle, rail, rod, or hoop iron unless total, nor for damage to goods or property on deck unless by special agreement in writing endorsed on this policy. This policy shall not cover loss or damage resulting from explosion of gunpowder, from acids, lime, or matches; no loss to be paid for detention of boat or cargo or demurrage.

It is understood and expressly agreed that this policy does not cover any damage from ice, and if the voyage is suspended or interrupted in consequence of ice for three consecutive days or more the trip risk shall cease and terminate at and from 12 o'clock at noon of the day the boat is stopped by ice; and in case the navigation of the canal shall during the trip be closed officially while the boat is on the canal the risk under this policy shall cease on the day the navigation is thus closed. Three days, however, next succeeding such stoppage and closing shall be allowed to discharge cargo, but any resumption of the voyage during the same season or the spring following shall not revive the risk or restore the liability of
275 these companies under this policy. The premium charged on any risk terminated by either of the above causes shall be considered, notwithstanding, as fully earned.

And provided further, and it is hereby agreed, that if the said insured shall have already made any other insurance upon the premises aforesaid not notified to these corporations and mentioned in or endorsed upon this policy, then this insurance shall be void and of no effect; and in case of any other insurance on the premises hereby insured, whether prior or subsequent to the date of this policy, the insured shall not, in case of loss or damage, be entitled to demand or receive of these companies any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on the said premises.

And it is further provided and hereby agreed that if the said boats, upon a regular survey, shall be deemed unseaworthy or unfit to prosecute said voyage or trip on account of rottenness or unseaworthiness, then the said companies shall not be liable to make good any loss under this policy; and it is understood that no loss is to be paid arising from any neglect in not keeping the boat well pumped out except in case of accident; and it is also further provided that the said boat shall at all times during the continuance of this policy be tight and well found in anchors, cable, rigging, tackle, and apparel as is usual and customary; also in all other things and means necessary and proper for the safe navigation thereof according to the usage and custom; and that whenever said vessel shall lie at anchor in the night time she shall show one or more lights in a conspicuous place so as to warn and give notice to approaching vessels.

And, further, should any loss or damage under this policy be occasioned by any other vessel, person, or persons in such a manner that such other vessel or the owners thereof or such person or persons shall be liable therefor, then all claims for such loss or damage shall be assigned over to these companies and shall inure to their benefit in proportion to the amount of such loss sustained by them—
that is to say, the amount of such loss shall be satisfied and
276 paid out of what shall be recovered by such claims in the
same proportion (according to the amount) as the losses sustained by other sufferers shall be paid out of said recovery.

This policy may be assigned: Provided, that before any loss happens notice shall have been given to these companies of such assignment; otherwise the companies shall not be bound to pay any loss upon this policy: And provided further, that the said companies when so notified shall be at liberty to return a ratable proportion of the premium and thereupon be exonerated from their responsibility by virtue of this policy, and the same shall cease and be of no further effect.

Losses and averages to be adjusted and settled on each voyage separately, and all differences may be submitted to the judgment of arbitrators, indifferently chosen, whose awards shall be binding on the parties; and in case these companies require it they shall be so submitted. It is furthermore hereby expressly provided that no suit or action against said companies for the recovery of any claim upon, under, or by virtue of this policy shall be sustainable in any court of law or chancery unless such suit or action shall be commenced within the time of twelve months next after said loss or damage shall occur; and in case any such suit or action shall be commenced against said companies after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby attempted to be enforced.

In witness whereof the presidents of the Providence Washington Insurance Co. and Security Insurance Co. have hereunto subscribed their names and caused the same to be attested by their secretaries this — day of ——, A. D. 188–.

CHAS. PETERSON,
President Security Insurance Co.

H. MASON, *Secretary.*

J. H. DE WOLF,
President Providence Washington Insurance Co.

J. B. BRANCH, *Secretary.*

277 This policy will not be valid unless countersigned by their duly authorized agent at ——.

Countersigned by—

—— ——, *Agent.*

(Edition C.)"

VI.

On or about the 17th day of May, 1883, at Buffalo, N. Y., Captain Charles E. Wager, the claimant, applied to H. Morse & Co. to procure him a cargo for the boat "William Worden" for New York; thereupon H. Morse & Co. applied to William Meadows aforesaid for a cargo for said boat, said Meadows knowing that said Morse & Co. were acting for said Wager in making said application, and an agreement was entered into, which agreement was signed by H. Morse & Co. and the claimant, Capt. Wager, under which the boat "William Worden" was to transport a cargo of 7,900 bushels of wheat from Buffalo to New York, which is evidenced by the bill of lading, which is as follows (Libellants' Exhibit 1):

No. —. BUFFALO, *May* 17, 1883.

"Shipped by W. Meadows, in apparent good order, on board the canal-boat 'Wm. Worden,' of Morse, whereof —— —— is master, the following-described property, to be transported to place of destination without unnecessary delay, and to be delivered as addressed on the margin, in like good order, in the customary manner, free of lighterage, upon payment of freight and charges as prescribed in this bill; consignees to pay all harbor towing from and to the usual place of landing; three week days, regardless of weather (including day of arrival, providing notice of arrival shall be given before four o'clock p. m.), after arrival and notice of same, to be allowed consignees to discharge this cargo, after which time the cargo or consignees are to pay demurrage at the rate of two and one-half per cent. per day upon the freight, including tolls, for each and every day of such demurrage over the three days, as above specified, until the cargo is fully discharged; and it is agreed between the carriers and shippers and assigns that, in consideration especially of the rate of freight herein named, the said carriers, having supervised the weighing of said cargo in board, hereby agree that this bill of lading 278 shall be conclusive as between shippers and assigns and carriers as to quantity of cargo received in board and to be delivered at port of destination, and that they will deliver the full quantity hereon named. All damage caused by the boat or the carrier, or deficiency in the cargo from quantity as hereon specified, to be paid for by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee. In case grain becomes heated while in transit the carrier shall deliver his entire cargo and pay only for any deficiency caused by heating exceeding five bushels for each one thousand bushels.

The freight charges or demurrage payable to as directed below or order, at place of destination, who is the only party authorized to collect the same, and whose receipt shall be in full for all demands on this cargo or bill of lading.

In witness thereof the said master of said boat hath affirmed to two bills of lading, one marked 'original' and one marked 'duplicate,' of this tenor and date, one of which being accomplished the other to stand void.

ARMOUR, PLANKINGTON & CO.,
New York.

7,900 bu. No. 2 red wheat, ex. cargo, schr. R. Hallaran.
Freight to New York, five (5) cents per bu.
Advanced charges, $200.

H. MORSE & CO.,
Per C. E. WOLFE.

(Seventy-nine hundred bushl.)

C. E. WAGER.

279 The freight charges and demurrage to the amount of $516.94 are payable by check to the order of the National Bank of the Republic, in New York, such check to be delivered to E. B. Brooke & Co. for such bank. The balance is payable to said E. B. Brooke & Co., who is the only party authorized to collect the same, whose receipt shall be in full for all demands therefor.

(New.)
(Eb. 28.)
Printed across face in red ink the word 'original.'

Endorsed: Armour, Plankington & Co., Whitlock."

VII.

Thereupon H. Morse & Co. applied in writing to Worthington & Sill, general agents of the libellants, to insure the said cargo of wheat on the boat "William Worden," a copy of which application is as follows:

(CLAIMANT'S EXHIBIT B.)

"Worthington & Sill, general agents, New England Underwriters, canal insurance; office, No. 48 Main street and 10 Dayton street, Buffalo, N. Y.

(Copy.)

Insurance is wanted by H. Morse & Co.—loss, if any, is payable to do. or order—on wheat in board, cargo of boat 'Wm. Worden,' $9,875, from Buffalo to New York.

Rate — cts. is ------------------------ $

Total premium ------------------------ $

Buffalo, May 17, 1883.

H. MORSE & CO., *Applicant.*"

280 On receipt of this application Messrs. Worthington & Sill, the libellants' general agents, issued and delivered to H. Morse & Co. a certificate of insurance, of which the following is a copy (Libellants' Exhibit No. 2):

"Providence Washington Ins. Co., Providence, R. I.

Security Ins. Co., New Haven, Conn.

New England Underwriters, inland marine department; Worthington & Sill, gen'l agents, Buffalo, N. Y.

Canal Cargo Certificate.

No. 668. $9,875.

This certifies that H. Morse & Co. insured under and subject to the conditions of policy No. 772, issued by the New England Underwriters, in the sum of ninety-eight hundred seventy-five dollars, in board cargo of boat 'Wm. Worden'—

On wheat, $9,875, at and from Buffalo to New York, —— to ——.

Loss (if any) payable to assured or order and return of this certificate.

This certificate of insurance is not valid until countersigned by the authorized agents of this company at Buffalo, N. Y.

Buffalo, N. Y., May 17th, 1883.

WORTHINGTON & SILL,
General Agents.

Written across face in red ink:

Received, New York, June 26th, 1883, from New England
281 Underwriters ninety-two hundred eleven $\frac{75}{100}$ dollars in full for all loss and damage under this certificate, which is hereby surrendered and annulled.

$9,211.75. AMOUR PLANKINTON.
WHITLOCK.

Endorsed: H. Morse & Co."

The way and manner in which this insurance was made on the cargo of wheat is the way and manner in which it has been customary to insure cargoes of grain in the canal transportation business for the last twenty-five years, and in no case of loss to the owners has it appeared that the insurance company has claimed to be subrogated to the rights of the owners as against the carrier.

VIII.

Thereupon H. Morse & Co. and Captain Charles E. Wager signed the above set forth bill of lading and took the bill of lading and the above set forth certificate of insurance, which H. Morse & Co. endorsed in blank and pinned them together and delivered them thus pinned together to Wm. Meadows, the above-named shipper, on receipt of the above-mentioned cargo of wheat in board the "Worden." There was no conversation between Morse & Co. and Meadows with reference to this particular insurance contract.

IX.

Thereafter, on the 18th day of May, 1883, the claimant, Charles E. Wager, signs and delivers to H. Morse & Co. a bill of lading, with endorsements made thereon, deducting from the affreightment money the insurance premium, H. Morse & Co.'s commission, charges for trimming the cargo on the boat "Worden," cash paid to Captain Wager, and cash to H. Morse & Co. on account, which is as follows (Claimant's Exhibit E):

"No. —. BUFFALO, *May* 18, 1883.

Shipped by H. Morse & Co., in apparent good order, on board the canal-boat 'William Worden,' of Syracuse, whereof Charles E. 282 Wager is master, the following-described property, to be transported to place of destination without unnecessary delay, and to be delivered as addressed on the margin, in like good order, in the customary manner, free of lighterage, upon payment of freight and charges as prescribed in this bill.

Consignees to pay all harbor towing from and to the usual place of landing. Three week days, regardless of weather (including day of arrival, providing notice of arrival shall be given before four o'clock p. m.), after arrival and notice of same, to be allowed consignees to discharge this cargo, after which time the cargo or consignees are to pay demurrage at the rate of two and one-half per cent. per day upon the freight, including tolls, for each and every day of such demurrage over the three days, as above specified, until the cargo is fully discharged; and it is agreed between the carriers and shippers and assigns that, in consideration especially of the rate of freight hereon named, the said carriers, having supervised the weighing of said cargo in board, hereby agree that this bill of lading shall be conclusive as between shippers and assigns and carriers as to quantity of cargo received in board and to be delivered at port of destination, and that they will deliver the full quantity hereon named. All damage caused by the boat or carrier, or deficiency in the cargo from quantity as hereon specified, to be paid for by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee. In case grain becomes heated while in transit the carrier shall deliver his entire cargo and pay only for any deficiency caused by heating exceeding five bushels for each one thousand bushels.

The freight charges and demurrage to the amount of $— are payable by check to the order of —— ——, New York, such check to be delivered to —— —— for such bank, the balance payable to said —— ——, who is the only party authorized to collect the same, whose receipt shall be in full for all demands therefor.

283 Tolls on this cargo having been advanced by H. Morse & Co., if refunded must be to them or to their order.

In witness whereof the said master of said boat hath affirmed to two bills of lading, one marked 'original' and one marked 'duplicate,' of this tenor and date, one of which being accomplished, the other to stand void.

7,900 bushels of wheat:

Freight to New York, per bushel, 5	$395 00
Captain's advance	319 44
On safe delivery E. B. Brooke & Co. collect as above and pay captain	75 56

Hold subject to our draft $319.44.

H. MORSE & CO.
FERO.

Care E. B. Brooke & Co., New York.
J. W. SCHLEHR,
Dep. Clerk.

Endorsed:

Insurance	$14 82
Commission	19 75
Trimming	9 87
Cash	34 74
H. Morse	240 26
	319 44"

This amount of money endorsed on the above bill of lading is taken out of Captain Wager's freight, Morse & Co. having paid for claimant the said premium to the libellant within five days after the issuing of said certificate of insurance, and to this amount is added two hundred dollars, which H. Morse & Co. advances to —— —— to pay on the cargo of wheat the back unpaid charges thereon for transportation on the lakes to Buffalo. Then H. Morse & Co. makes out a draft as follows (Claimant's Exhibit D):

284 "H. Morse & Co.

$516.94. BUFFALO, N. Y., *May* 18, 1883.

Pay to the order of J. W. Bridgman, cashier, five hundred and sixteen $\frac{94}{100}$ dollars fifteen days after date; or if you shall sooner collect freight and charges on canal-boat 'William Worden,' then pay said sum immediately thereafter. A bill of lading of such boat is placed in your hands, bearing date May 17, 1883, for the express purpose of enabling you to meet this draft.

H. MORSE & CO.
J. FERO.

To E. B. Brooke & Co., New York.

Protest for non-acceptance only.

Printed across the face in red ink:

— accept this draft and agree to pay the amount named as therein directed at the —.

(Signed) E. B. BROOKE & CO."

This draft, with the above bill of lading made by Capt. Charles E. Wager, wherein H. Morse & Co. are represented as shippers, H. Morse & Co. forwarded to their agents in New York, to whom the captain is consigned, to wit, E. B. Brooke & Co. By this method H. Morse & Co. collect their commissions and reimburse themselves for the moneys advanced as above. The balance of the affreightment money not advanced to Captain Wager at Buffalo by H. Morse & Co. is paid to him by E. B. Brooke & Co. at New York.

At the time Captain Wager delivers to H. Morse & Co. the bill of lading last above mentioned he also signs the account stated as endorsed on the bill of lading in the shipping book kept by H. Morse & Co. and allowed to H. Morse & Co. the premium paid for the insurance of the cargo of wheat, with their commissions and the other items therein stated.

285

X.

When H. Morse & Co. made application for the insurance of the cargo of wheat to be transported in the boat "William Worden" they intended the insurance for the benefit of themselves and Charles E. Wager, the captain and owner of the boat "William Worden;" and when Worthington & Sill, the libellants' general agents, issued the certificate of insurance on the said cargo to H. Morse & Co. they intended to insure H. Morse & Co. and Captain Charles E. Wager, the owner of the boat "Worden." Morse & Co. when they applied for the insurance acted as agent for Captain Wager and received said commission of five cents on the amount of the freight.

XI.

Then, on or about May 18th, 1883, Captain Wager proceeded with said boat "Warden," loaded with said cargo of wheat, and said steam canal-boat "Sidney," loaded with a cargo of corn, the boat "Worden" being coupled to and ahead of the "Sidney" on his voyage to New York, the boat "Sidney" being the propelling boat. This was the usual and customary method of navigating such boats; and all the parties to and interested in the shipment and insurance of the said cargo of wheat had due and timely notice thereof and made no objection thereto.

XII.

When Captain Wager arrived at Lockport he stopped said boat and caused the boiler of the steamboat "Sidney" to be thoroughly cleaned, and then tested by the builder of it, and proceeded on his voyage until he arrived at Schenectady, when he discovered that the boiler commenced to leak. He ran the boat to Troy, and then stopped and had the boiler repaired, and again tested it and found it tight, and then proceeded on his voyage down the Hudson
286 river. He arrived a little above Esopus Island about twelve o'clock at night on the 29th of May, when steam was discovered escaping from the boiler. At this time the tide was ebb and the wind was blowing a strong breeze from the west. The steam dropped until the boats became unmanageable, and the wind and tide carried the boats upon the rocks which are situated at the north end of the said Esopus Island, and the boat "Worden" was sunk and her cargo became nearly a total loss. The evidence shows that there was no negligence on the part of the captain and crew of the "Sidney," but that the collision was brought about without fault on their part.

XIII.

The cargo on the "Worden" was abandoned to the said insurance company, the libellants, and payment therefor was made to Armour, Plankinton & Co., the consignees of the cargo, and to H. Morse & Co., on presentation of said certificate of insurance, as their respective interest appeared. The loss was paid under the said insurance voluntarily and no mistake of facts or charge of fraud is alleged or proved.

Conclusions of Law.

First.

Under the terms of the bill of lading H. Morse & Co. and Charles E. Wager were carriers of the said cargo of wheat on the boat "William Worden."

Second.

The open policy of insurance and the certificate of insur-
287 ance are to be read together as constituting the contract of insurance, and under their terms, read in the light of the bill of lading to which the certificate was pinned, Armour, Plankinton & Co. were insured as owners, H. Morse & Co. as carriers and advancers, and Charles E. Wager as carrier.

Third.

That payment of the loss under said policy of insurance and said certificate of insurance to any one or more of the insured was for the benefit of all the insured, and no cause of action remains to any one of the insured against the others, and therefore no cause of action by subrogation to — insurance company could accrue against any one of the insured. In other words, there could be no subrogation.

Fourth.

A voluntary settlement and payment of the loss under the insurance policy are binding, and cannot be ripped up and set aside except upon allegations and proofs of such settlement and payment having been made under a mistake of fact, duress, fraud, or some other legal ground. This rule applies to the immediate parties to the settlement and those in privity with them.

Fifth.

That the collision and loss aforesaid was not caused by want of ordinary care on the part of the persons engaged in managing the boats "Sidney" and "William Worden."

Sixth.

288 The loss having been paid under the terms of the insurance policy, the libellants are estopped from bringing suit against the claimant for any loss which is admitted by the payment of the loss, without objections, to have accrued under the terms of the insurance policy.

Seventh.

That the decree appealed from should be affirmed and a decree entered in favor of the claimant and appellee, with costs of this appeal and the costs of the court below.

289 The court thereafter and upon due deliberation filed with the clerk of the said circuit court the following findings of fact and conclusions of law as found by the court:

290 United States Circuit Court.

THE PROVIDENCE AND WASHINGTON INSURANCE COMPANY *et al.*
vs.
THE STEAM CANAL-BOAT "SYDNEY" and Her Consort, THE "WILLIAM WORDEN."

Findings of Fact.

(1.)

Prior to the seventeenth day of May, 1883, the libellants issued and delivered to the firm of H. Morse & Co., of Buffalo, New York, a policy of insurance reciting that "on account of H. Morse & Co., for whom it may concern, they do insure the several persons whose names are hereafter endorsed on the policy as owner, advancer, or common carrier of goods, merchandise, or produce on his own boat or boats belonging to others, loaded on commission or chartered, from place to place, as indorsed hereon or in a book kept for that purpose, for the several amounts, at the rate, and on the goods, merchandise, or produce as specified in the indorsement, beginning the adventure upon the goods, merchandise, or produce from and immediately following the lading thereof at the port or place of the indorsement and continuing the same until the goods, merchandise, or produce shall be safely landed at the port of destination." The policy, among other things, excepted from the risk all losses arising from want of ordinary care and skill in lading or navigating the boats.

291 (2.)

On the seventeenth day of May, 1883, Morse & Co. applied to the agent of the libellants at Buffalo for insurance upon a cargo of wheat to be carried on board the canal-boat William Worden from Buffalo to New York, and requested the loss, if any, to be made payable to Morse & Co. or order. Thereupon the agent of the libellants entered in the book a memorandum designating Morse & Co. as the persons on whose account insurance was effected, describing the boat, cargo, and voyage and specifying the amount insured upon the cargo on the voyage from Buffalo to New York as $9,875 and the premium as $14.82. At the same time the agents of the libellants delivered to Morse & Co. a certificate certifying that Morse & Co. were insured under and subject to the conditions of the policy before mentioned in the sum of $9,875 on cargo of wheat on board boat William Worden from Buffalo to New York, loss, if any, payable to assured or order.

(3.)

At the time when the foregoing policy and certificates were executed and issued by the libellants Morse & Co. were doing business at Buffalo as intermediaries between boatmen and shippers of cargo in procuring cargoes to be shipped for a commission. They were applied to by the owner of the canal-boat Worden to procure him a cargo for New York. They thereupon applied to one Meadows, who was an agent for Armour, Plankinton & Co., for a cargo and agreed with him to transport 7,900 bushels of wheat from Buffalo to New York on the boat Worden, and to insure the same for a freight of five cents per bushel. Thereupon they entered into a contract with the owner of the Worden, evidenced by a bill 292 of lading, in which they were described as shippers of the cargo, for transportation of the cargo to New York, and procured the certificate of insurance aforesaid and endorsed and delivered to the agent for Armour, Plankinton & Co., and at the same time entered into a contract with him for the transportation of the cargo to New York, evidenced by a bill of lading, in which they described themselves as carriers and Armour, Plankinton & Co. as shippers. The agreement for transportation between Armour, Plankinton & Co. and Morse & Co. was as follows:

293 (Libellants' Exhibit 1.)

" No. —. Buffalo, *May* 17, 1883.

" Shipped by W. Meadows, in apparent good order, on board the canal-boat ' Wm. Worden,' of Morse, whereof —— —— is master, the following-described property, to be transported to place of destination without unnecessary delay and to be delivered as addressed on the margin in like good order, in the customary manner, free of lighterage, upon payment of freight and charges as prescribed in this bill, consignees to pay all harbor towing from and to the usual place of landing. Three week days, regardless of weather (including day of arrival, providing notice of arrival shall be given before four o'clock p. m.), after arrival and notice of same, to be allowed consignees to discharge this cargo, after which time the cargo or consignees are to pay demurrage at the rate of two and one-half per cent. per day upon the freight, including tolls, for each and every day of such demurrage over the three days as above specified until the cargo is fully discharged ; and it is agreed between the carriers and shippers and assigns that, in consideration especially of the rate of freight herein named, the said carriers, having supervised the weighing of said cargo in board, hereby agree that this bill of lading shall be conclusive as between shippers and assigns and carriers as to quantity of cargo received in board and to be delivered at port of destination, and that they will deliver the full quantity hereon named. All damage caused by the boat or the carrier, or deficiency in the cargo from quantity as hereon specified, to be paid for by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee. In case grain becomes heated while in transit the carrier shall deliver his entire cargo and pay only for any deficiency caused by heating exceeding five bushels for each one thousand bushels.

The freight charges or demurrage payable to —— ——, as directed below, or order, at place of destination, who is the only party authorized to collect the same, and whose receipt shall be in full for all demands on this cargo or bill of lading.

In witness thereof the said master of said boat hath affirmed to two bills of lading, one marked ' original ' and one marked ' duplicate,' of this tenor and date, one of which being accomplished, the other to stand void.

ARMOUR, PLANKINGTON & CO.,
New York.

7,900 bu. No. 2 red wheat, ex. cargo, schr. R. Hallaran.
Freight to New York, five (5) cents per bu.
Advanced charges, $200.

H. MORSE & CO.,
Per C. E. WOLFE.

(Seventy-nine hundred bushl.)

C. E. WAGER.

294 The freight charges and demurrage to the amount of $516.94 are payable by check to the order of the National Bank of the Republic in New York, such check to be delivered to E. B. Brooke & Co. for such bank; the balance is payable to said E. B. Brooke & Co., who is the only party authorized to collect the same, whose receipt shall be in full for all demands therefor.

(New.)
(Eb. 28.)

Printed across face in red ink the word 'original.'

Endorsed: Armour, Plankington & Co., Whitlock."

295 The agreement made between Morse & Co. and the master of the Worden was as follows:

(CLAIMANT'S EXHIBIT E.)

"No. —. BUFFALO, *May* 18, 1883.

Shipped by H. Morse & Co., in apparent good order, on board the canal-boat 'William Worden,' of Syracuse, whereof Charles E. Wager is master, the following-described property, to be transported to place of destination without unnecessary delay, and to be delivered as addressed on the margin, in like good order, in the customary manner, free of lighterage, upon payment of freight and charges as prescribed in this bill.

Consignees to pay all harbor towing from and to the usual place of landing. Three week days, regardless of weather (including day of arrival, providing notice of arrival shall be given before four o'clock p. m.), after arrival and notice of same, to be allowed consignees to discharge this cargo, after which time the cargo or consignees are to pay demurrage at the rate of two and one-half per cent. per day upon the freight, including tolls, for each and every day of such demurrage over the three days, as above specified, until the cargo is fully discharged; and it is agreed between the carriers and shippers and assigns that, in consideration especially of the rate of freight hereon named, the said carriers, having supervised the weighing of said cargo in board, hereby agree that this bill of lading shall be conclusive as between shippers and assigns and carriers as to quantity of cargo received in board and to be delivered at port of destination, and that they will deliver the full quantity hereon named. All damage caused by the boat or carrier, or deficiency in the cargo from quantity as hereon specified, to be paid for by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee. In case grain becomes heated while in transit the carrier shall deliver his entire cargo and pay only for any deficiency caused by heating exceeding five bushels for each one thousand bushels.

The freight charges and demurrage to the amount of $— are payable by check to the order of —— ——, New York, such check to be delivered to —— —— for such bank, the balance payable to said —— ——, who is the only party authorized to collect the same, whose receipt shall be in full for all demands therefor.

296 Tolls on this cargo having been advanced by H. Morse & Co., if refunded must be to them or to their order.

In witness whereof the said master of said boat hath affirmed to two bills of lading, one marked 'original' and one marked 'duplicate,' of this tenor and date, one of which being accomplished, the other to stand void.

7,900 bushels of wheat:

Freight to New York, per bushel, 5	$395 00
Captain's advance	319 44
On safe delivery E. B. Brooke & Co. collect as above and pay captain	75 56

Hold subject to our draft $319.44.

H. MORSE & CO.
FERO.

Care E. B. Brooke & Co., New York.
J. W. SCHLEHR,
Dep. Clerk.

Endorsed:

Insurance	$14 82
Commission	19 75
Trimming	9 87
Cash	34 74
H. Morse	240 26
	319 44"

297 (4.)

At the time Morse & Co. executed and delivered the bill of lading to the agent of Armour, Plankinton & Co. the claimant, as master of the Worden, also executed a duplicate bill of lading, describing himself as carrier, and delivered it to said agent. The first-named bill of lading was signed also by the master of the Worden.

(5.)

By the agreement for the transportation of the cargo between Morse & Co. and the claimant the latter was to receive five cents per bushel as freight, less the amount to be paid as premium for insuring the cargo and less a commission of 5 per cent. upon the whole freight money to Morse & Co.

(6.)

Morse & Co. advanced to the agent of Armour, Plankinton & Co. $200 for prior advances made by the agent upon the wheat, and by the bills of lading the cargo was to be delivered upon payment of this advance and the freight.

(7.)

At the time of making application for the insurance, receiving the certificate, and signing the several bills of lading it was understood between Morse & Co. and the claimant that the latter owned the Worden and the Sydney and intended to tow the Worden by the Sydney on the voyage.

(8.)

Upon the voyage the Worden was wholly under the control of the Sydney, and both boats were navigated as one vessel practi-
298 cally, and on the twenty-eighth day of May, 1883, while proceeding on the voyage down the Hudson river, the Worden struck the rocks on Esopus Island and sunk, and her cargo was damaged to the amount of $6,175.89. These were well-known rocks, easily avoidable by vessels.

(9.)

There is no evidence of any negligence on the part of the Worden or the Sydney, except that the steam-boiler of the Sydney was in an unsafe and unfit condition for the purposes of the voyage. The flues were weak, one of them burst, the steam escaped, all motive power was lost, and in consequence thereof the Worden was carried by the wind and tide upon the rocks. The boiler had not been thoroughly tested or examined since the preceding July. Two or three days before the accident the boiler leaked steam upon the voyage, commencing at Schenectady and continuing until the boats reached Troy. At Troy the master of the Sydney caused repairs costing $3.50 to be made to the boiler, but no thorough examination or special test of the boiler was made to ascertain what its condition really was. The condition of the boiler was such that the defects existing would have been discovered if a thorough examination and test had been made. Shortly after the accident necessary repairs upon the boiler and engine were made which cost over $200.

(10.)

June 26, 1883, the libellants paid to Armour, Plankinton & Co. the sum of $9,211.75 on account of the loss of the cargo insured; and upon an abandonment by the owners to the libellants and about the same time they paid to Morse & Co. the sum of $520 in full for their interest in the cargo.

299 *Conclusions of Law.*

(1.)

The loss was sustained by reason of the negligent navigation of those in charge of the Sydney.

(2.)

The libellants are entitled to a decree in the sum of $6,175.89, with interest from May 28, 1883, with costs of this court and of the district court.

(Signed) WM. J. WALLACE.

300 [Endorsed:] U. S. circuit court, S. D. of N. Y. The Providence Washington Insurance Co., &c., against The Steam Canal-Boat "Sydney," &c. Findings. Hyland & Zabriskie, proc's for cl'm't, 30 Park Place, rooms 30, 31, & 32, New York city. To —— ——, Esq., —— for ——. Due and timely service of a copy of the within —— is hereby admitted. Dated N. Y. city, —— —, 188–. —— ——, —— for ——.

[Endorsed:] —— court. —— ——, plaintiff, against —— ——, defendant. To —— ——, attorney for —— ——. Sir: Please take notice that the within is a true copy of —— in above-entitled action, this day duly filed and entered in the office of the clerk of the above-named court in the —— in the city of New York. Dated N. Y. city, —— —, 188–. Yours, &c., Hyland & Zabriskie, attorneys for —— ——. Office and P. O. address, No. 30 Park Place, New York city.

CITY AND COUNTY OF NEW YORK, *ss:*

—— ——, being duly sworn, says that he is —— years of age; that on the — day of ——, 188–, at No. — ——, in the city of New York, deponent served the within —— on —— ——, the attorney for the —— therein named, by delivering to and leaving with a person in charge of —— said office at above place a true copy thereof, said —— being absent at the time of such service.

—— ——.

Sworn to before me this — day of ——. 188–.

—— ——.

301 United States Circuit Court, Southern District of New York.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY and THE SECURITY INSURANCE COMPANY

vs.

THE STEAM CANAL-BOAT "SYDNEY" and THE CANAL-BOAT "WORDEN."

WALLACE, *J.:*

The libel in this cause avers, in substance, that the libellants, insurance corporations engaged in the business of marine insurance, did by a policy of insurance agree to indemnify Armour, Plankinton & Company, the owners of a certain cargo of wheat on board the canal-boat "Worden" upon a voyage from Buffalo to New York, against the usual marine risks and perils of the voyage; that there was a total loss of the cargo upon the voyage and an abandonment by the owners to the libellants; that the canal-boat "Worden" upon the voyage was fastened to the steam canal-boat "Sydney," and was entirely dependent on the "Sydney" for motive power; that both the "Worden" and the "Sydney" were owned by the same persons; that the loss occurred by the negligence of the persons in charge of

the two boats, in consequence of which the "Worden" was driven upon the rocks of Esopus Island, in the Hudson river, and sunk; that the libellants became liable to the owners of the cargo in the sum of
$9,211.75, as for a total loss, and paid that sum to them as
302 the insurance upon said cargo, whereby libellants became
subrogated to the owners' cause of action against the vessels.

The answer of the claimant admits that he was the owner of both vessels; denies that the libellants insured the owners of the cargo of the "Worden;" alleges that the policy insured the claimant as carrier of the cargo; denies all averments of negligence; admits that the "Worden," while being towed by the "Sydney" and while entirely under the control and management of the "Sydney," struck the rocks upon Esopus Island and sunk; admits that these were well-known rocks, easily avoidable ordinarily by tow-boats and their tows; and avers that the "Worden" foundered by reason of the bursting of the boiler of the "Sydney," whereby that steamer was unable to control her movements and was carried by the tide and wind until the "Worden" struck the rocks. The answer further alleges that the claimant paid the premium to the libellants for the insurance upon the agreement that the payment of any loss or damage to the cargo *in transitu* should accrue to the benefit of the claimant and relieve him from his liability for such loss as a common carrier.

The district court dismissed the libel, and upon this appeal by the libellants the following facts are found:

1. Prior to the 17th day of May, 1883, the libellants issued and delivered to the firm of H. Morse & Company, of Buffalo, N. Y., a policy of insurance reciting that "on account of H. Morse & Company, for whom it may concern, they do insure the several persons
whose names are hereinafter endorsed on the policy as owner,
303 advancer, or common carrier on goods, merchandise, or pro-
duce on his own boat or boats belonging to others, loaded on commission or chartered from place to place, as endorsed hereon or in a book kept for that purpose, for the several amounts, at the rate, and on the goods, merchandise, or produce as specified in the endorsement, beginning the adventure upon the goods, merchandise, or produce from and immediately following the landing thereof at the port or place of the endorsement and continuing the same until the goods, merchandise, or produce shall be safely landed at the port of destination." The policy, among other things, excepted from the risk all losses arising from want of ordinary care and skill in lading or navigating the boats.

2. On the 17th day of May, 1883, Morse & Company applied to the agent of the libellants at Buffalo for insurance upon a cargo of wheat to be carried on board the canal-boat "William Worden" from Buffalo to New York, and requested the loss, if any, to be made payable to Morse & Company or order; thereupon the agent of the libellants entered in the book a memorandum designating Morse & Company as the persons on whose account insurance was effected, describing the boat, cargo, and voyage and specifying the amount insured upon the cargo on the voyage from Buffalo to New York as

$9,875, and the premium as $14.82. At the same time the agents of the libellants delivered to Morse & Company a certificate certifying that Morse & Company were insured, under and subject to the conditions of the policy before mentioned, in the sum of $9,875 on
cargo of wheat in board boat “William Worden,” from Buf-
304 falo to New York, loss, if any, payable to assured or order.

3. At the time when the foregoing policy and certificates were executed and issued by the libellants, Morse & Company were doing business at Buffalo as intermediaries between boatmen and shippers of cargo in procuring cargoes to be shipped for a commission. They were applied to by the owner of the canal-boat “Worden” to procure him a cargo for New York. They thereupon applied to one Meadows, who was an agent for Armour, Plankinton & Company, for a cargo, and agreed with him to transport 7,900 bushels of wheat from Buffalo to New York on the boat “Worden,” and to insure the same for a freight of five cents per bushel. Thereupon they entered into a contract with the owner of the “Worden,” evidenced by a bill of lading, in which they were described as shippers of the cargo, for transportation of the cargo to New York, and procured the certificate of insurance aforesaid and endorsed and delivered it to the agent for Armour, Plankinton & Company, and at the same time entered into a contract with him for the transportation of the cargo to New York, evidenced by a bill of lading, in which they described themselves as carriers and Armour, Plankinton & Company as shippers.

4. At the time Morse & Company executed and delivered the bill of lading to the agent of Armour, Plankington & Company the claimant, as master of the “Worden,” also executed a duplicate bill of lading, describing himself as carrier, and delivered it to said agent.

5. By the agreement for the transportation of the cargo between
Morse & Company and the claimant the latter was to receive
305 five cents per bushel as freight, less the amount to be paid as
premium for insuring the cargo and less a commission of
five per cent. upon the whole freight-money to Morse & Company.

6. Morse & Company advanced to the agent of Armour, Plankinton & Company $206 for prior advances made by the agent upon the wheat, and by the bills of lading the cargo was to be delivered upon payment of this advance and the freight.

7. At the time of making application for the insurance, receiving the certificate, and signing the several bills of lading it was understood between Morse & Company and the claimant that the latter owned the “Worden” and the “Sydney” and intended to tow the “Worden” by the “Sydney” on the voyage.

8. Upon the voyage the “Worden” was wholly under the control of the “Sydney,” and both boats were navigated as one vessel practically, and on the 28th day of May, 1883, while proceeding on the voyage down the Hudson river, the “Worden” struck the rocks on Esopus Island and sunk, and her cargo was damaged to the amount of $6,175.89. These were well-known rocks, easily avoidable by vessels.

9. There is no evidence of any negligence on the part of those in

charge of the navigation of the "Worden" or the "Sydney," except such as appears from the admissions in the answer of the claimant.

10. June 26th, 1883, the libellants paid to Armour, Plankinton & Company the sum of $9,211.75 on account of the loss of the cargo insured and upon an abandonment by the owners to the libellants,
and about the same time they paid to Morse & Company the
306 sum of $520 in full for their interest in the cargo.

It is to be observed that the cause of action upon which the libel proceeds is for negligence. It is not claimed that the vessels or either of them are liable because of a breach of the carrier's contract. The libellants assert that they have succeeded to the rights of Armour, Plankinton & Company, as the owners of the cargo of the "Worden," to recover against both boats because of loss sustained by reason of the negligent navigation of the boats. There is no allegation in the libel that the libellants have succeeded to the rights of Armour, Plankinton & Company by an assignment of the cause of action. The libellants rely purely upon subrogation. The case consequently presents two questions: First, whether upon the facts a cause of action existed in favor of Armour, Plankinton & Company against one or both of the vessels at the time of the payment to them of the loss by the libellants; and, second, whether the libellants stand by subrogation in the place of Armour, Plankinton & Company to enforce that cause of action. If Armour, Plankinton & Company were not entitled to the insurance, as between themselves and the libellants, under the policy and certificate, the libellants cannot recover.

Treating the case as though Armour, Plankinton & Company were libellants, their right to recover against the vessels would not be affected by the fact that they had been paid the full amount of their loss by the insurers. The Monticello, 17 How., 152. If the
insured owner has accepted payment from the insurer, the
307 latter may use the name of the assured to obtain redress from
the persons whose conduct caused the loss. At law the insurer, upon subrogation to the rights of the assured by payment of the loss, can only maintain such a suit in the name of the assured. Gales *vs.* Haliman, 11 Penn. St., 515; Hart *vs.* Western R. R. Co., 13 Met., 99; Hall *vs.* R. R. Co., 13 Wall., 367; Mercantile Ins. Co. *vs.* Calebs, 20 N. Y., 173. In admiralty, however, there seems to be no reason why the insurer may not, as in equity, maintain the suit in his own name as the real party in interest. Fretz *vs.* Ball, 12 How., 466; The Monticello *vs.* Morrison, 17 How., 155. As the libellants have paid Morse & Company for their interest in the loss, all the parties whose rights are involved are before the court.

Although the answer denies negligence in the navigation of the vessels, it admits facts which raise a presumption of negligence. It admits that the "Worden," while upon her voyage on the Hudson river, was propelled against well-known rocks, and alleges in exculpation that this took place because the vessel became unmanageable in consequence of the bursting of the boiler of the "Sydney." As both the vessels were navigated as one and were owned by the claimant, the case is to be treated as though the libel were filed

against the "Sydney" alone, and as though a vessel having the power to move or stop at pleasure in a channel of sufficient breadth were charged with negligence by reason of being brought into collision with a well-known obstruction, easily avoidable by those in charge. In the absence of any explanatory evidence to indicate that the accident was one which could not be foreseen or pre-
308 vented by the exercise of proper nautical skill, the facts admitted establish a *prima facie* case of negligence, The Granite State, 3 Wall., 310; The Orient Ins. Co. *vs.* The Saunders, 25 Fed. Rep., 727. No evidence has been offered in support of the exculpatory allegations of the answer. Even had it been shown that the accident was occasioned by the explosion of the boiler, and that after such explosion the "Worden" could not have been saved from being driven with such violence upon the rocks as to sink her, it would still have been incumbent upon the claimant to show that the boiler was in a safe condition and was properly managed. Boilers do not usually explode when they are in a safe condition and are prudently managed, and the fact of an explosion therefore creates a presumption of negligence, which those who are responsible for the consequences must overthrow by evidence showing due care or the existence of circumstances over which they have no control, to which the result may be fairly attributed. Transportation Co. *vs.* Downer, 11 Wall., 129; Steamboat "New World" *vs.* King, 16 How., 477; Rintoul *vs.* N. Y. C. & H. R. R. R. Co., 21 Blatch., 439; Mullen *vs.* St. John, 57 N. Y., 567. In the case of Rose *vs.* The Stevens & Condit Transportation Co. it was held in this court that negligence may be inferred, from the fact of the explosion of a steam-boiler on a vessel, even where the defendant is under no contract obligation to the plaintiff. 20 Blatch, 411. It follows that a sufficient case was shown to authorize a recovery by the owner of the cargo against the vessels.

Assuming that Armour, Plankinton & Company could re-
309 cover upon the proofs, if they were libellants, it remains to consider whether the libellants became subrogated to their cause of action. The rule is elementary that payment of a total loss by the insurer works an equitable assignment to him of the property and all the remedies which the insured had against the others for the loss. The question is, then, whether Armour, Plankinton & Company were insured to the extent of their interest as owners of the cargo under the policy and certificate issued by the libellants to Morse & Company.

The contract of insurance is found in the policy and certificate supplemented by such extrinsic evidence as may be properly received to explain but not to contradict their terms. The policy is a running or floating policy, intended to cover future shipments of goods or produce. Its phraseology respecting the persons and interests to be insured is somewhat equivocal, owing doubtless to the fact that the words "on account of H. Morse & Company for whom it may concern" were written into the printed form adapted to insure all persons who might become parties to it by endorsing their names thereon. By its terms the voyage, the amount to be insured, the

property, and the rate of premium are to be described by an endorsement upon the policy or in a book kept for that purpose, such endorsement to be approved and signed by the libellants. It is to be read as though the libellants undertook to insure Morse & Company for themselves and those whom they might represent in procuring insurance, and also undertook, at the request of Morse & Company, to insure any other persons having an interest as owners, advancers, or common carriers whose names and interests
310 should thereafter be endorsed upon the policy. When the names of Morse & Company were inserted in it it was appropriate to meet the different classes of transactions which an insurance by them might represent. It was such as would enable them to effect an insurance in their own names when they had an interest in the risk as advancers or carriers, or to obtain insurance for the owner, advancer, or carrier, and in his name if they desired or had no interest themselves. Upon the correct construction insurance effected in the name of Morse & Company was to inure to the benefit of all concerned—that is, for the benefit of all for whom they acted in obtaining insurance—and when insurance was not effected in the name of Morse & Company the name of the person to be insured, with a statement of his interest, was to be endorsed on the policy, and he would thereby become the assured. Upon any other construction the words "for whom it may concern" are nugatory. Insurance in the name of another might some time be desirable when Morse & Company had no interest in the transaction other than that of agent for procuring cargoes and insurance upon them for others for a commission.

No endorsement was made upon the policy of the name of the person insurred, but upon the application for the insurance the memorandum of the property, the voyage, the amount of insurance, and the rate were entered by the libellants in the book kept for that purpose, as recited in the certificate delivered by them to Morse & Company. The certificate and policy are to be read together, and so read form a contract between the libellants
311 and Morse & Company to insure the latter "for whom it may concern." This was an insurance for Armour, Plankinton & Company to the extent of their interests as owners of the cargo, because the proofs show indisputably that Morse & Company obtained the insurance at the request and for the protection of Armour, Plankinton & Company. It was also an insurance for the benefit of Morse & Company to the extent of their interests as carriers and for advances.

Although the general rule is that if a policy insures the interest only of the person named in it no other person can show that it was also intended to cover his interest, it is otherwise if the policy contains the phrase "for whom it may concern," and under such a policy the intention of the person who effects the insurance determines the application of the clause. The insurance effected by him insures all who have an insurable interest in the property to the extent of their interests where there is previous authority or subsequent ratification of an insurance obtained for them. This is so whether the intention of the person effecting the insurance is known to the insurer or not, and the persons whose interests are thus insured may sue upon the policy in their own names, and a recovery by one inures to the benefit of all and bars a recovery by the others. The phrase ordinarily applies, however, only to those who are contemplated at the time of the insurance and who then had an insurable interest in the subject-matter. 1 Parsons on Marine Insurance, 45; Hopper *vs.* Robinson, 98 U. S., 528; Henshaw *vs.* The Mutual Safety Ins. Co., 2 Blatch., 99; Herman *vs.* Louisiana State 312 Ins. Co., 7 La., 502; Duncan *vs.* Sun Ins. Co., 12 La. Ann., 486; Buck *vs.* Chesapeake Ins. Co., 1 Peters, 151; Rogers *vs.* Traders Ins. Co., 6 Paige, 583.

It is not apparent how the libellants after payment of the loss to Armour, Plankinton & Company maintained any different position in respect to their right to recover against the vessel than would have been occupied by Armour, Plankinton & Company if the suit had been brought by them before payment of the loss. The libellants did not by paying the loss admit in favor of the claimant that the loss was one within the risk of the policy and therefore not within one of the accepted risks as a loss arising from the want of ordinary care in navigating the boat. They were obliged to pay the loss to Armour, Plankinton & Company before they could assert any claim against him. When they paid it they became Armour, Plankinton & Company for the purposes of enforcing the cause of action. They would doubtless be precluded from maintaining an action against Armour, Plankinton & Company to recover back the payment unless they could show fraud or mistake. But it is impossible to see how this circumstance can prejudice them in an action against a third person. Moreover, if the payment should be treated as an admission on the part of the libellants of their understanding at the time that the loss was one within the terms of the policy and did not arise from an excepted risk, nevertheless the evidence now is that the loss arose by reason of the negligence of those in charge of the vessels.

The decision in the court below, as appears by the opinion of the learned district judge, was placed upon the ground that the insurance effected by Morse & Company was an insurance for 313 themselves only, but if otherwise was intended by them to cover the insurable interest of the claimant in the cargo as carrier; that the insurance therefore inured to the claimant's benefit as well as to that of Morse & Company and Armour, Plankinton & Company, and protected him to the extent of his liability as carrier for the delivery of the cargo to the owner, and that payment to the owner was in legal effect payment to him and concluded the insurers from maintaining the suit without affirmative allegations and proof that the payment was made upon a mistake of facts.

If Morse & Company were the only parties insured the libel was properly dismissed, if for no other reason, because it does not proceed upon the theory that the libellants have succeeded to any rights by subrogation except to those of Armour, Plankinton & Company; but the conclusion that Morse & Company were the only parties to the contract can only be reached by refusing to give any effect to the phrase in the policy "for whom it may concern." That phrase is meaningless if it does not mean that an insurance effected in their names is to extend to all for whom they are authorized to insure. If the policy were to be interpreted as intended to insure only those persons whose names and interests should be endorsed upon it, then it would read as though the phrase "on account of Morse & Company for whom it may concern" were altogether omitted. With the phrase inserted it is unnecessary to endorse the name subsequently upon the policy, but all become parties "for whom it may concern" to any insurance which may be effected upon their application. Upon any other construction of the policy it would have been useless to insert the name of Morse & Company in the policy at all.

314 If the libellants were attempting to enforce a cause of action against the claimant for a breach of his obligations as a carrier, and if they had insured him as carrier as well as Morse & Company and Armour, Plankinton & Company, it would seem very clear that they could not succeed. In such a case they would be attempting to reclaim moneys which they had agreed to appropriate in part for his indemnity against the very loss which had arisen—a fund which became his to an extent commensurate with his obligations as a carrier as soon as the loss took place; but they do not seek to recover back money which they have paid him or paid to some one else in part for him in discharge of their contract of indemnity. They seek to charge him for negligence in destroying the property which has become theirs by an equitable assignment from the owner.

The proofs do not show that the interest of the carrier was intended to be insured by Morse & Company when they applied for the insurance and procured the certificate. If, as was thought to be the fact by the district judge, the premium was paid for the insurance by the claimant that circumstance would be quite controlling to indicate an understanding between Morse and himself that his interest should be protected by the insurance. The evidence is that he agreed through Morse & Company with the agent of Armour, Plankinton & Company to pay the premium as a part of the consideration of the contract for transportation. In other words, he agreed for $395 to transport the cargo to New York and pay the premium for insurance. He paid it out of the $395 received from Morse & Company and in no other way. The owners paid
315 the premium when Morse & Company were paid by them.

Considerable evidence was elicited from the witnesses, for the purpose of showing usage among shippers, insurers, and boatmen at Buffalo, to the effect that insurance procured under circumstances similar to those in this case is understood to protect the carrier as well as all other persons interested in the safe transportation of the cargo. The evidence falls short of establishing such a usage. It is loose, conflicting, conjectured, and equivocal. See Donnell *vs.* Columbia Ins. Co., 2 Sumn., 386; The Eddy, 5 Wall., 481; Holton *vs.* Colder, 1 Watts., 360; U. S. *vs.* Buchanan, 8 How'd, 83, 102. So far as this evidence tends to show that Morse & Company when they procured the insurance intended to obtain it for the benefit of the carrier as well as for the owners and themselves it is legitimate, but it is not pursuasive in view of the fact that the insurance was procured at the request of the owners and as a condition of the contract for transportation, and the further fact that there was no conversation between Morse & Company and the master of the "Worden."

These considerations lead to a reversal of the decree of the district court. The apostles indicate that the question whether the claimant was guilty of negligence in the navigation of the boats has not been fully litigated, and that the claimant has mistakenly relied upon the theory that the facts proved did not make out a *prima facie* case against him. It is therefore deemed proper to permit the claimant to apply for leave to introduce further evidence upon the question
whether the loss arose from the want of ordinary care and
316 skill in the navigation of the boats. Unless such an applica-
tion is made within twenty days a decree will be entered for the libellants in the sum of $6,175.89, with interest from May 28th, 1883, with costs in this court and in the district court.

317 [Endorsed:] U. S. district court, S. D. of N. Y. Providence Washington Ins. Co. against The Steam Canal B't "Sydney," &c. Copy. Opinion of Wallace, J. Hyland & Zabriskie, proc's for cl'm't, 30 Park Place, rooms 30, 31, & 32, New York city. To —— ——, Esq., —— for ——. Due and timely service of a copy of the within —— is hereby admitted. Dated N. Y. city, —— —, 188–. —— ——, —— for ——.

[Endorsed:] —— court. —— ——, plaintiff, against —— ——, defendant. To —— ——, attorney for —— ——. Sir: Please take notice that the within is a true copy of —— in above-entitled action, this day duly filed and entered in the office of the clerk of the above-named court in the —— in the city of New York. Dated N. Y. city, —— —, 188–. Yours, &c., Hyland & Zabriskie, attorneys for —— ——. Office and P. O. address, No. 30 Park Place, New York city.

CITY AND COUNTY OF NEW YORK, *ss:*

—— ——, being duly sworn, says that he is —— years of age; that on the — day of ——, 188–, at No. — ——, in the city of New York, deponent served the within —— on —— ——, the attorney for the —— therein named, by delivering to and leaving with a person in charge of —— said office at above place a true copy thereof, said —— being absent at the time of such service.

—— ——.

Sworn to before me this — day of ——, 188–.

—— ——.

318 United States Circuit Court.

THE PROVIDENCE AND WASHINGTON INSURANCE COMPANY *et al.*
v.
THE STEAM CANAL-BOAT SYDNEY and Her Consort, THE WILLIAM WORDEN.

WALLACE, *J.*:

The proofs which have been taken upon the issue whether the claimant was guilty of negligence in the navigation of the Worden not only do not overcome the *prima facie* case made by the libellants, but establish affirmatively that the Worden was lost by reason of such negligence. As the safe navigation of the Worden in view of the nature of the voyage depended upon the efficiency of the steam apparatus by which the motive power was to be supplied, 319 common prudence required the claimant to see to it that this apparatus was in a fit condition for the undertaking in hand. Owing to the defective condition of the Sydney's boiler all motive power was lost at a critical moment, and in consequence the Worden was carried by the force of the tide and wind upon the rocks.

The claimant had owned the Sydney since the fall of 1882, and while he owned her, although she had been employed in harbor navigation during the winter, had never had her steam-engine critically examined, but relied upon the presumption that her apparatus was safe because she had been inspected in July, 1882, and found then in proper condition, as appeared from the official 320 certificate of the proper officials; but the claimant had actual knowledge of facts in regard to her boiler which were sufficient to require him to exercise unusual precaution to ascertain whether it was in a proper condition for the services required. The boiler had leaked steam upon the previous part of the voyage, and it was found to be necessary to stop at Troy and repair it. The visible defects were remedied by inconsiderable repairs, but no examination or test was made to ascertain whether the boiler was in safe condition for the further prosecution of the voyage. The character and extent of the defects discovered after the accident were such as to leave no room to doubt that if a careful examination and test 321 had been made at the time of the repairs the unsafe condition of the boiler would have been disclosed.

The only negligence in the navigation of the vessels shown by the proofs is that which relates to the unfit condition of the boiler.

A decree is ordered for the libellants for $6,175.89, with interest from May 28, 1883, with costs of this court and of the district court.

Endorsed: Providence Ins. Co. *v.* The Sydney & The Worden. Opinion, Wallace, J. U. S. circuit court. Filed Mar. 14, 1887. Timothy Griffith, clerk.

322 That thereafter and on the 30th day of March, 1887, a final decree was entered, bearing date the 29th day of March, 1887, wherein it was ordered, adjudged, and decreed that the decree of the

district court dismissing the libel of the said libellants be reversed, and that the libellants recover of said vessels the sum of $6,175.89, besides interest and costs, of which decree the following is a copy:

323 At a stated term of the circuit court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on the 29th day of March, 1887.

Present: The Honorable William J. Wallace, circuit judge.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY OF PROVIDENCE, Rhode Island, and The Security Insurance Company of New Haven, Connecticut, Libellants and Appellants,

vs.

THE STEAM CANAL-BOAT "SYDNEY," HER ENGINES, &C., and THE Canal-Boat "William Worden," Her Tackle, Apparel, &c., whereof Charles E. Wager is Claimant & Appellee.

This case having been heard upon the appeal of the libellants from the decree of the district court of the United States for the southern district of New York upon the pleadings and proofs in said district court and the additional testimony taken in this court on said appeal, and having been argued and submitted by the advocates of the respective parties, and due deliberation being had in the premises—

324 It is now ordered, adjudged, and decreed by the court that the said decree of the district court be, and the same is hereby, in all things reversed, with costs in both courts, and that the libellants recover in this action against the steam canal-boat "Sidney," her engines, &c., and the canal-boat "William Worden," her tackle, apparel, and furniture, the sum of six thousand one hundred and seventy-five $\frac{89}{100}$ths dollars ($6,175.89), with interest thereon from May 28th, 1883, to the date of this decree, amounting to the sum of one thousand four hundred and twenty $\frac{30}{100}$ dollars ($1,420.30), together with the sum of six hundred and fifty-six $\frac{28}{100}$ths dollars ($656.28) costs, as taxed in this court and in the said district court, amounting in the aggregate to the sum of eight thousand two hundred and fifty-two $\frac{47}{100}$ths dollars ($8,252.47), and that the said steam canal-boat "Sydney," her engines, &c., and said canal-boat "William Worden," her tackle, apparel, and furniture, be condemned therefor.

And whereas, on the 25th day of July, 1883, the said steam canal-boat "Sydney," then being in the custody of the marshal of the United States district court, southern district of New York, pursuant to process duly issued in behalf of the libellants in this action, was, by order of said district court, duly sold by said marshal at public sale, and the proceeds of such sale, to wit, the sum of $2,100, was, by the said marshal, paid into the registry of the court;

And whereas the value of said canal-boat "William Worden," after process duly issued against her, was fixed by consent at the sum of $1,000, for which the usual stipulation for value was duly given: Now, therefore—

325 It is further ordered, adjudged, and decreed that the proceeds of the sale of the said steam canal-boat "Sydney," together with the interest thereon which has accrued since the same was deposited in the registry of the court, be paid over to the libellants herein or to their proctor, Edward D. McCarthy, Esq. (after first deducting the fees of the officers of the court), towards the satisfaction of this decree unless an appeal be allowed, taken, and perfected within forty-five days from the date of this decree.

It is further ordered, adjudged, and decreed that unless such appeal be allowed and perfected within said time the stipulators for costs and for the value of the canal-boat "William Worden," filed on behalf of the claimant in this action, cause the engagement of their stipulations to be performed or to show cause before this honorable court within four days after the expiration of said time to appeal and after the service of a copy of this decree upon the proctors for said claimant, or upon the first day of jurisdiction thereafter, why summary judgment should not be entered against them and libellants and appellees have execution towards the satisfaction of this decree. WM. J. WALLACE.

326 [Endorsed:] U. S. circuit court, southern dist. of N. Y. The Providence Wash. Ins. Co. *et al.*, lib'ts, against The "Sydney," &c., defendant. Final decree. Edward D. McCarthy, proctor for libellants, 50 Wall street, New York city. To Hyland & Zabriskie. Esqs., proctors for claimant. Admitted service of copy M'ch 31, '87, Rec'd March 28, '87. Filed March 30, '87. —— ——, attorney for —.

[Endorsed:] Sirs: Take notice that the within-proposed decree will be presented for settlement to the Honorable William J. Wallace, circuit judge, at his chambers in the post-office building, N. Y. city, on the 29th day of March, 1887, at 10.45 o'clock a. m. M'ch 28, '87. Yours, E. D. McCarthy, libt's proctors. To Hyland & Zabriskie, cl'm't's proctors.

327 The claimant of said vessels thereafter and on the 18th day of May, 1887, took an appeal from said final decree to the Supreme Court of the United States, and on said day filed in the office of the clerk of said circuit court the following exceptions, namely:

328 Circuit Court of the United States for the Southern District of New York.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY of Providence, Rhode Island, and The Security Insurance Company of New Haven, Connecticut, Libellants and Appellees,

vs.

THE STEAM CANAL-BOAT "SYDNEY," HER ENGINES, etc., and The Canal-Boat "William Worden," Her Tackle, Apparel, etc., whereof Charles E. Wager is Claimant and Appellant.

} Exceptions.

The claimant and appellant, Charles E. Wager, excepts to the findings of the court and the refusals of the court to find as follows:

First.

To the third finding of fact.

The learned judge finds in his third finding of fact that "and at the same time entered into a contract with him (Meadows) for the transportation of the cargo to New York, evidenced by a bill of lading in which they (H. Morse & Co.) described themselves as carriers and Armour, Plankinton & Co. as shippers;" to which the claimant excepts on the ground that there is no evidence upon which to base such a finding of fact.

He ought to have found, as appears from said bill of lading set forth in the third finding of fact, that H. Morse & Co. and Charles E. Wager, the claimant, entered into a contract with W. Meadows for the transportation of the cargo to New York, evidenced by a bill of lading in which Morse & Co. and Charles E. Wager
329 described themselves as carriers and W. Meadows as shipper and Armour, Plankinton & Co. as consignees.

Second.

To the third finding of fact.

The learned judge finds in his third finding of fact that they, Morse & Co., "agreed with him (Meadows) to transport 7,900 bushels of wheat from Buffalo to New York on the boat 'Worden,' and to insure the same for a freight of five cents per bushel;" to which the claimant excepts on the ground that there is no evidence upon which to base such a finding of fact.

The bill of lading set forth in the third finding of fact, which contains the agreement for transportation, makes no mention of an agreement to insure the cargo.

Third.

To the fourth finding of fact.

The learned judge finds in his fourth finding of fact that "at the time Morse & Co. executed and delivered the bill of lading to the agent of Armour, Plankinton & Co. the claimant, as master of the 'Worden,' also executed a duplicate bill of lading, describing himself as carrier, and delivered it to said agent. The first-named bill of lading was signed also by the master of the 'Worden;'" to which the claimant excepts on the ground that there is no evidence upon which to base such a finding of fact.

He ought to have found that H. Morse & Co. and Charles E. Wager executed and delivered the original bill of lading and
330 at the same time they, H. Morse & Co. and Charles E. Wager, executed and delivered a duplicate thereof.

Fourth.

To the fifth finding of fact.

The learned judge finds in the fifth finding of fact that "by agreement for transportation of the cargo between Morse & Co. and the claimant the latter was to receive five cents per bushel as freight, less the amount to be paid as premium for insuring the cargo and less a commission of five per cent. upon the whole freight money to Morse & Co;" to which the claimant excepts on the ground that there is no evidence upon which to base such a finding of fact.

He ought to have found, as appears by the agreement between Morse & Co. and the claimant, set forth in the third finding of fact, that the claimant was to receive five cents per bushel as freight, being the same rate agreed upon by Morse & Co. and claimant with Meadows.

Fifth.

To the ninth finding of fact.

He finds in the ninth finding of fact that "the boiler had not been thoroughly tested or examined since the preceding July," and that "at Troy, New York, no thorough examination or special test of the boiler was made to ascertain what its condition really was. The condition of the boiler was such that the defects existing would have been discovered if a thorough examination and test had been made;" to which the claimant excepts on the ground that there is no evidence upon which to base such a finding of fact.

331 He ought to have found that the boiler was examined by the maker thereof, Gordon W. Hall, on or about the 20th of May, 1883, at Lockport, New York, and was tested and found to be tight, and that thereafter, when said boiler was repaired at Troy, it was again tested by putting on steam and found to be tight, and that no other defects were found in the boiler except the flue, which burst, and which had been repaired at Troy before said steamboat continued on her voyage down the Hudson river, and that there was no negligence shown on the part of the master and crew of the "Sydney" and "Worden" whereby said accident was occasioned.

Exceptions to Conclusions of Law.

First.

To the first conclusion of law.

The court finds as a conclusion of law that "the loss was sustained by the reason of the negligent navigation of those in charge of the 'Sydney;'" to which the claimant excepts.

He ought to have found that there was no negligence on the part of the persons navigating and in charge of the "Sydney" whereby said loss was occasioned.

Second.

To the second conclusion of law.

The court finds as a conclusion of law that "the libellants are entitled to a decree in the sum of six thousand one hundred seventy-five $\frac{89}{100}$ dollars, with interest from May 28, 1883, with costs of this court and the district court;" to which the claimant excepts.

He ought to have found that the libel should be dismissed, with the costs of this court and the district court to the claimant.

332

Exceptions to Refusals to Find.

First.

To the fifth finding of fact requested by claimant.

Claimant requested the court to find as follows:

"Fifth. In the spring of the year 1883, before the opening of navigation on the Erie canal at Buffalo, N. Y., the libellants herein, through their said agents, Worthington & Sill, in accordance with a custom which had been carried out by the libellants for several successive years prior thereto, issued and delivered to H. Morse & Co., for the purpose of soliciting marine insurance risks, the open policy of insurance referred to by the learned judge in the first finding of fact;" which the court refused to find or pass upon, and to such refusal to find or pass upon claimant excepts.

Second.

To the seventh finding of fact requested by claimant.

Claimant requested the court to find as follows:

"Seventh. Thereupon H. Morse & Co. applied in writing to Worthington & Sill, general agents of the libellants, to insure the said cargo of wheat on the boat 'William Worden,' a copy of which application is as follows (Claimant's Exhibit B):

'Worthington & Sill, general agents, New England Underwriters, canal insurance; office, No. 48 Main street and 10 Dayton street, Buffalo, N. Y.

(Copy.)

Insurance is wanted by H. Morse & Co.—loss, if any, is
333 payable to do. or order—on wheat in board, cargo of boat
'William Worden'—
$9,875, from Buffalo to New York.

Rate — cts., is .... \$—
Total premium .... \$—

Buffalo, May 17, 1883.

H. MORSE & CO., *Applicant.*'

On receipt of this application Messrs. Worthington & Sill, the libellants' general agents, issued and delivered to H. Morse & Co. a certificate of insurance, of which the following is a copy (Libellants' Exhibit No. 8):

'Providence Washington Ins. Co., Providence, R. I.

Security Ins. Co., New Haven, Conn.

New England Underwriters, inland marine department; Worthington & Sill, gen'l agents, Buffalo, N. Y.

Canal Cargo Certificate.

No. 668. $9,875.

This certifies that H. Morse & Co. insured under and subject to the conditions of policy No. 772, issued by the New England Underwriters, in the sum of ninety-eight hundred seventy-five dollars in board cargo of boat "Wm. Worden"—

On wheat, $9,875, at and from Buffalo to New York, —— to ——.

Loss (if any) payable to assured or order and return of this certificate.

334 This certificate of insurance is not valid until countersigned by the authorized agent of this company at Buffalo, N. Y.

Buffalo, N. Y., May 17th, 1883.

WORTHINGTON & SILL,
General Agents.

Written across face in red ink:

Received, New York, June 26th, 1883, from New England Underwriters ninety-two hundred eleven $\frac{75}{100}$ dollars in full for all loss and damage under this certificate, which is hereby surrendered and annulled.

$9,211.75. ARMOUR, PLANKINTON.
WHITLOCK.

Endorsed: H. Morse & Co.'

The way and manner in which this insurance was made on the cargo of wheat is the way and manner in which it has been customary to insure cargoes of grain in the canal transportation business for the last twenty-five years, and in no case of loss to the owners has it appeared that the insurance company has claimed to be subrogated to the rights of the owners as against the carrier;" which the court refused to find or pass upon, and to such refusal to find and pass upon claimant excepts.

Third.

To the eighth finding of fact requested by claimant.

Claimant requested the court to find as follows:

"Eighth. Thereupon H. Morse & Co. and Captain Charles E. Wager signed the above set forth bill of lading and took the bill of lading and the above set forth certificate of insurance, 335 which H. Morse & Co. endorsed in blank, and pinned them together and delivered them thus pinned together to Wm. Meadows, the above-named shipper, on receipt of the above-mentioned cargo of wheat in board the 'Worden.' There was no conversation between Morse & Co. and Meadows with reference to this particular insurance contract;" which the court refused to find or pass upon, and to such refusal to find or to pass upon claimant excepts.

Fourth.

To the tenth finding of fact requested by claimant.

Claimant requested the court to find as follows:

"Tenth. When H. Morse & Co. made application for the insurance of the cargo of wheat to be transported in the boat 'William Worden' they intended the insurance for the benefit of themselves and Charles E. Wager, the captain and owner of the boat 'William Worden,' and when Worthington & Sill, the libellants' general agents, issued the certificate of insurance on the said cargo to H. Morse & Co. they intended to insure H. Morse & Co. and Captain Charles E. Wager, the owner of the boat 'Worden.' Morse & Co., when they applied for the insurance, acted as agent for Captain Wager and received said commission of five cents on the amount of the freight;" which the court refused to find or pass upon, and to such refusal to find or pass upon claimant excepts.

Fifth.

To the twelfth finding of fact requested by claimant.

Claimant requested the court to find as follows:

"Twelfth. When Captain Wager arrived at Lockport he
336 stopped said boat and caused the boiler of the steamboat 'Sydney' to be thoroughly cleaned and then tested by the builder of it, and proceeded on his voyage until he arrived at Schenectady, when he discovered that the boiler — commenced to leak. He ran the boat to Troy and then stopped and had the boiler repaired and again tested it and found it tight, and then proceeded on his voyage down the Hudson river. He arrived a little above Esopus Island about twelve o'clock at night on the 29th of May, when steam was discovered escaping from the boiler. At this time the tide was ebb and the wind was blowing a strong breeze from the west. The steam dropped until the boats became unmanageable, and the wind and the tide carried the boats upon the rocks which are situated at the north end of the said Esopus Island, and the boat 'Worden' was sunk, and her cargo became nearly a total loss. The evidence shows that there was no negligence on the part of the captain and crew of the 'Sidney,' but that the collision was brought about without fault on their part;" which the court refused to find or pass upon, and to such refusal to find or pass upon claimant excepts.

Sixth.

To the thirteenth finding of fact requested by claimant.

Claimant requested the court to find as follows:

"Thirteenth. The cargo on the 'Worden' was abandoned to the

said insurance company, the libellants, and payment therefor was made to Armour, Plankinton & Co., the consignees of the cargo, and to H. Morse & Co. on presentation of said certificate of insurance, as their respective interests appeared. The loss was paid under
337 the said insurance voluntarily, and no mistake of facts or charge of fraud is alleged or proved;" which the court refused to find or pass upon, and to such refusal to find or pass upon claimant excepts.

Exceptions to the Refusal to Find or Pass upon the Conclusions of Law Proposed by Claimant.

First.

Claimant requested the court to find as a conclusion of law as follows:

"First. Under the terms of the bill of lading H. Morse & Co. and Charles E. Wager were carriers of the said cargo of wheat on the boat 'William Worden;'" which the court refused to find or pass upon, and to which refusal to find or pass upon claimant excepts.

Second.

Claimant requested the court to find as a conclusion of law as follows:

"Second. The open policy of insurance and the certificate of insurance are to be read together as constituting the contract of insurance, and under their terms, read in the light of the bill of lading to which the certificate was pinned, Armour, Plankinton & Co. were insured as owners, H. Morse & Co. as carriers and advancers, and Charles E. Wager as carrier;" which the court refused to find or pass upon, and to which refusal to find or pass upon claimant excepts.

Third.

Claimant requested the court to find as a conclusion of law as follows:

"Third. That payment of the loss under said policy of in-
338 surance and said certificate of insurance to any one or more of the insured was for the benefit of all the insured, and no cause of action remains to any one of the insured against the others, and therefore no cause of action by subrogation to an insurance company could accrue against any one of the insured. In other words, there could be no subrogation;" which the court refused to find or pass upon, and to which refusal to find or pass upon claimant excepts.

Fourth.

Claimant requested the court to find as a conclusion of law as follows:

"Fourth. A voluntary settlement and payment of the loss under the insurance policy are binding and cannot be ripped up and set aside except upon allegations and proofs of such settlement and payment having been made under a mistake of fact, duress, fraud, or some other legal ground. This rule applies to the immediate parties to the settlement and those in privity with them;" which the court refused to find or pass upon, and to which refusal to find or pass upon claimant excepts.

Fifth.

Claimant requested the court to find as a conclusion of law as follows:

"Fifth. That the collision and loss aforesaid was not caused by want of ordinary care on the part of the person engaged in managing the boats 'Sydney' and 'William Worden;'" which the court refused to find or pass upon, and to which refusal to find or pass upon claimant excepts.

339 Sixth.

Claimant requested the court to find as a conclusion of law as follows:

"Sixth. The loss having been paid under the terms of the insurance policy, the libellants are estopped from bringing suit against the claimant for any loss which it is admitted by the payment of the loss, without objections, to have accrued under the terms of the insurance policy;" which the court refused to find or pass upon, and to which refusal to find or pass upon claimant excepts.

Seventh.

Claimant requested the court to find as a conclusion of law as follows:

"Seventh. That the decree appealed from should be affirmed and a decree entered in favor of the claimant and appellee, with costs of this appeal and the costs of the court below;" which the court refused to find or pass upon, and to which refusal to find or pass upon claimant excepts.

HYLAND & ZABRISKIE,
Proctors for Claimant & Appellant.

340 [Endorsed:] U. S. circuit court, S. D. of N. Y. The Providence Washington Ins. Co. & ano. against The Steam Canal-Boat "Sydney" & ano. (Copy.) Claimant's exceptions to findings & to refusals to find. Hyland & Zabriskie, proc's for claimant, 30 Park Place, rooms 30, 31, & 32, New York city. To —— ——, Esq., — for —. Due and timely service of the within exceptions and notice of filing is hereby admitted. Dated N. Y. city, May 18th, 1887. E. D. McCarthy, — for lib'ts.

[Endorsed:] U. S. circuit court, S. D. of N. Y. The Providence Washington Insurance Company & ano. against The Steam Canal-Boat "Sydney" & ano. To E. D. McCarthy, proc. for libellants. Sir: Please take notice that the within is a true copy of the exceptions in above entitled action this day duly filed and entered in the office of the clerk of the above-named court, in the P. O. b'ld'g, in the city of New York. Dated N. Y. city, May 18, 1887. Yours, &c., Hyland & Zabriskie, proc's for claimant; office and P. O. address, No. 30 Park Place, New York city.

CITY AND COUNTY OF NEW YORK, *ss:*

—— ——, being duly sworn, says that he is — years of age; that on the — day of ——, 188–, at No. — ——, in the city of New York, deponent served the within — on —— ——, the attorney for the — therein named, by delivering to and leaving with a person in charge of —— —— said office at above place a true copy thereof, said —— —— being absent at the time of such service.

—— ——.

Sworn to before me this — day of ——, 188–.

—— ——.

341 On the 18th and 19th days of May, 1887, the claimant of said vessels also filed in the office of the clerk of the said circuit court the following notice of appeal, citation, and petition of appeal, duly approved and allowed by Hon. Samuel Blatchford, one of the associate justices of the Supreme Court of the United States, and his bond on appeal, also duly approved by said associate justice, namely:

342 United States Circuit Court, Southern District of New York.

THE PROVIDENCE AND WASHINGTON INSURANCE COMPANY OF Providence, Rhode Island, and The Security Insurance Company of New Haven, Connecticut, Libellants and Appellees,

vs.

THE STEAM CANAL-BOAT "SYDNEY," HER ENGINES, ETC., and THE Canal-Boat "William Worden," Her Tackle, Apparel, etc., whereof Charles E. Wager is Claimant and Appellant.

Take notice that Charles E. Wager, the claimant herein, hereby appeals to the Supreme Court of the United States from the whole and every part of the decree entered in the above-entitled cause on the 30th day of March, 1887, and dated March 29th, 1887.

Dated New York city, May 16th, 1887.

Yours, &c., HYLAND & ZABRISKIE,
Proctors for Cl'm't and App'l't, 30 *Park Place, New York City.*

To E. D. McCarthy, Esq., proctor for libellant, and Timothy Griffith, Esq., clerk U. S. circuit court, S. D. of N. Y.

343 [Endorsed:] U. S. circuit court, south. dist. of N. Y. The Providence Washington Insurance Co. *et al.* against The Steam Canal Boat "Sydney" & ano. Notice of appeal and filing. Hyland & Zabriskie, proc's for cl'm't & appl't, 30 Park Place, rooms 30, 31, & 32, New York city. To —— ——, Esq., — for —. Due and timely service of a copy of the within notice of appeal is hereby admitted.

Dated N. Y. city, May 18, 1887. E. D. McCarthy, proctor for libellant. U. S. circuit court. Filed May 19, 1887. Timothy Griffith, clerk.

[Endorsed :] — court. —— ——, plaintiff, against —— ——, defendant. To —— ——, attorney for —— ——. Sir: Please take notice that the within is a true copy of — in above-entitled action, this day duly filed and entered in the office of the clerk of the above-named court in the —, in the city of New York. Dated N. Y. city, —— —, 188–. Yours, &c., Hyland & Zabriskie, attorneys for —— ——; office and P. O. address, No. 30 Park Place, New York city.

CITY AND COUNTY OF NEW YORK, *ss:*

—— ——, being duly sworn, says that he is — years of age; that on the — day of ——, 188–, at No. — ——, in the city of New York, deponent served the within — on —— ——, the attorney for the — therein named, by delivering to and leaving with a person in charge of — said office at above place a true copy thereof, said — being absent at the time of such service.

—— ——.

Sworn to before me this — day of ——, 188–.

—— ——.

344 By the Honorable Samuel Blatchford, one of the associate justices of the Supreme Court of the United States and circuit justice in the second circuit.

To the Providence Washington Insurance Company of Providence, Rhode Island, and the Security Insurance Company of New Haven, Connecticut:

Whereas Charles E. Wager, as claimant, has made the appeal to the Supreme Court of the United States from a decree rendered in the circuit court of the United States for the southern district of New York, in the second circuit, in your favor and against said claimant, which decree awards said libellants the sum of six thousand one hundred and seventy-five $\frac{89}{100}$ dollars principal, one thousand four hundred and twenty $\frac{30}{100}$ dollars interest, and six hundred and fifty-six $\frac{28}{100}$ dollars costs as taxed, as stated and alleged in the notice and petition of appeal of the said claimant, and has filed security required by law, you are therefore cited to appear before the said Supreme Court, at the city of Washington, D. C., on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Washington, D. C., this 17th day of May, in the year of our Lord one thousand eight hundred and eighty-seven.

(Signed) SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY OF PROVIDENCE, Rhode Island, and The Security Insurance Company of New Haven, Connecticut, Libellants and Appellees,

vs.

THE STEAM CANAL-BOAT "SYDNEY," HER ENGINES, ETC., and THE Canal-Boat "William Worden," Her Tackle, Apparel, etc., whereof Charles E. Wager is Claimant and Appellant.

To the honorable the Supreme Court of the United States:

The petition and appeal of Charles E. Wager, the claimant and appellant above named, respectfully showeth—

That on the 23d day of July, 1883, the libellants herein filed their libel in the district court of the United States for the southern district of New York against the above-named vessels, claiming nine thousand two hundred and eleven $\frac{75}{100}$ dollars in an alleged cause of collision, civil and maritime, and to which libel the appellant refers for further particulars.

That process was duly issued by said district court and the said vessels attached thereunder, and thereafter the said canal-boat "William Worden" was bonded in the sum of one thousand dollars, her value having been fixed at that amount by consent, for which the usual stipulation for value in that sum was duly given.

That on or about the 25th day of July, 1883, the said steam canal-boat "Sydney," then being in the custody of the U. S. marshal for the southern district of New York, pursuant to said process, was, by order of said district court, with the consent of her owner, 346 this appellant, duly sold by said marshal at public sale, and the proceeds of said sale, to wit, the sum of two thousand one hundred dollars, was by the marshal paid into the registry of this court.

That on or about the 10th day of September, 1883, this appellant, having given the usual stipulation for costs, filed in the office of the clerk of the said district court his answer to said libel, praying that the same be dismissed with costs, as by reference to said answer will more fully appear.

That the said cause came on to be heard before Honorable Addison Brown, judge of the said district court, on the 6th, 7th, and 8th days of January, 1885, upon the pleadings herein and the proofs adduced on behalf of the libellants and claimant and argument had thereon, and, the said cause having been submitted on the last-named day, the said district court judge did, on the 18th day of February, 1885, make a final decree or sentence in favor of said claimant herein dismissing the said libel with costs, as by a reference to the said decree will more fully appear.

That after the entry of such final decree an appeal was taken to the circuit court of the United States for the southern district of New York by the said libellants, and the said cause was removed thereby to the said circuit court upon the pleadings and proofs in the district court and additional proofs taken in the circuit court, and such

proceedings were had in the said circuit court that on or about the 30th day of March, 1887, a final decree was entered in said circuit court, bearing date March 29, 1887, whereby it was ordered, adjudged, and decreed, amongst other things, that the said de-
347 cree of the district court be in all things reversed and that
the libellants herein recover the sum of six thousand one hundred and seventy-five $\frac{89}{100}$ dollars, with one thousand four hundred and twenty $\frac{30}{100}$ dollars interest, together with six hundred and fifty-six $\frac{28}{100}$ dollars costs, as taxed in said circuit and district courts, amounting in the aggregate to the sum of eight thousand two hundred and fifty-two $\frac{47}{100}$ dollars, and that the above-named vessels be condemned therefor, as by reference to said decree will more fully appear.

And your appellant is advised and insists that said decree is erroneous, inasmuch as he is entitled to have said libel dismissed with costs in the said district and circuit courts and this court; whereupon appellant, for these and other reasons, appeals to the Supreme Court of the United States from each and every part of the said decree of the circuit court, and on the said appeal intends to seek a new decision on the facts and pleadings in the circuit court and proofs to be adduced in the Supreme Court.

And your appellant insists, amongst other things, that he was the party insured or one of the parties insured under the policies of insurance referred to in the libel herein or entitled to the benefit of such insurance, and that the damage and loss also referred to in said libel were not occasioned by any fault or negligence on the part of your appellant or the master and crew of either of said vessels, and that libellant, having paid the loss under said policies of insurance, cannot now claim that said loss was occasioned by any negligence on the part of your appellant or the master and crew of either of said vessels.

348 And your appellant respectfully prays that the said decree of the said circuit court and the libel, answers, orders, proofs, proceedings, findings, exceptions, bill of exceptions, and all other papers appertaining thereto in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause over, and that the said decree of the said circuit court may be reversed and the libel herein be dismissed with costs in this court and the courts below, or such other decree made as to the said Supreme Court shall seem just.

Dated May 16th, 1887.

HYLAND & ZABRISKIE,
Proctors for Cl'm't and Ap'l't, 30 *Park Place, N. Y. City, N. Y.*

The above appeal from the said final decree of the circuit court of the United States for the southern district of New York to the Supreme Court of the United States is allowed as prayed for.

Dated May 16th, 1887.

SAM'L BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

349 [Endorsed:] U. S. Supreme Court. The Providence Washington Insurance Co. & ano. against The Steam Canal-Boat "Sydney" & ano, Chas. E. Wager, claimant. Petition of appeal, order allowing same, and citation. Hyland & Zabriskie, proc's for cl'm't & app'l't, 30 Park Place, rooms, 30, 31, & 32, New York city. To —— ——, Esq., — for —. Service of a copy of the within petition, order, & citation is hereby admitted. Dated N. Y. city, May 18, 1887. E. D. McCarthy, proctor for libellant. U. S. circuit court. Filed May 9, 1887. Timothy Griffith, clerk.

[Endorsed:] — court. —— ——, plaintiff, against —— ——, defendant. To —— ——, attorney for —. Sir: Please take notice that the within is a true copy of — in above-entitled action, this day duly filed and entered in the office of the clerk of the above-named court, in the —, in the city of New York. Dated N. Y. city, —— —, 188–. Yours, &c., Hyland & Zabriskie, attorneys for —; office and P. O. address, No. 30 Park Place, New York city.

CITY AND COUNTY OF NEW YORK, *ss:*

—— ——, being duly sworn, says that he is — years of age; that on the — day of ——, 188–, at No. — ——, in the city of New York, deponent served the within — on —— ——, the attorney for the — therein named, by delivering to and leaving with a person in charge of — said office at above place a true copy thereof, said — being absent at the time of such service.

—— ——.

Sworn to before me this — day of ——, 188–.

—— ——.

350 United States Circuit Court, Southern District of New York.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY OF PROVIDENCE, Rhode Island, and The Security Insurance Company of New Haven, Connecticut, Libellants and Appellees,

vs.

THE STEAM CANAL-BOAT "SYDNEY," HER ENGINES, ETC., and THE Canal-Boat "William Worden," Her Tackle, Apparel, etc., whereof Charles E. Wager is Claimant and Appellant.

Know all men by these presents that we, Charles E. Wager, claimant and appellant, and Henry Morse and Alanson Morse are held and firmly bound unto The Providence Washington Insurance Company of Providence, Rhode Island, and The Security Insurance Company of New Haven, Connecticut, libellants above named, in the sum of twenty-five hundred dollars, to be paid to the said libellants, their and each of their successors or assigns; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 10th day of May, 1887.

Whereas Charles E. Wager, claimant of the vessels above named, has prosecuted an appeal to the Supreme Court of the United States, at the city of Washington, in the District of Columbia, to reverse
the decree rendered in the above-entitled suit by the circuit
351 court of the United States for the southern district of New
York, dated March 29th, 1887, and filed March 30th, 1887:

Now, therefore, the condition of this obligation is such that if the above-named claimant and appellant shall prosecute said appeal to effect and answer all damages and costs if he fail to make his plea good, including just damages for delay and for the use and detention of the property and the costs of the suit and costs and interest on the appeal which shall be awarded against him as such appellant therein if he shall fail to make his plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

CHARLES E. WAGER. [L. S.]
HENRY MORSE. [L. S.]
ALANSON MORSE. [L. S.]

Sealed and delivered and taken and acknowledged before me this 10th day of May, 1887.

[SEAL.] MARTIN CLARK,
Notary Public, Erie Co., N. Y.

UNITED STATES OF AMERICA,
Northern District of New York, } *ss:*

Henry Morse and Alanson Morse, sureties above named, being severally and duly sworn, depose and say and each for himself saith that he resides at the city of Buffalo, New York, and is worth the sum of five thousand dollars over and above all his just debts and liabilities and property exempt by law from execution.

HENRY MORSE.
ALANSON MORSE.

Sworn to before me this 10th day of May, 1887.

[SEAL.] MARTIN CLARK,
Notary Public, Erie Co., N. Y.

UNITED STATES OF AMERICA,
Northern District of New York, } *ss:*

On this 11th day of May, 1887, before me, the subscriber, personally appeared Charles E. Wager, to me known to be the person of that name described in and who executed the foregoing bond on appeal, and he acknowledged that he executed the same.

[SEAL.] M. C. TUCKER,
Notary Public, Wayne Co., N. Y.

The foregoing bond is approved as to form and sufficiency of sureties to operate as a supersedeas and stay of execution.

SAMUEL BLATCHFORD,
Associate Justice of the Supreme Court of the United States.

352 [Endorsed:] U. S. circuit court, S. D. of N. Y. Providence Washington Insurance Co. *et al.* against The Steam Canal-Boat "Sydney," &c. (Copy.) Bond on appeal. Hyland & Zabriskie, proc's for claimant, 30 Park Place, rooms 30, 31, & 32, New York city. To ——— ———, Esq., — for —. Due and timely service of a copy of the within bond on appeal is hereby admitted. Dated N. Y. city, May 19th, 1887. U. S. circuit court. Filed May 18, 1887. Timothy Griffith, cl'k.

CITY AND COUNTY OF NEW YORK, *ss:*

——— ———, being duly sworn, says that he is — years of age; that on the — day of ———, 188–, at No. — ———, in the city of New York, deponent served the within — on ——— ———, the attorney for the — therein named, by delivering to and leaving with a person in charge of — said office at above place a true copy thereof, said ——— ——— being absent at the time of such service.

——— ———.

Sworn to before me this — day of ———, 188–.

——— ———.

353 The following are copies of the order permitting further testimony to be taken, consent and order of sale of the steam canal-boat "Sydney," *venditioni exponas* issued thereon, marshal's return thereto, consent fixing value of "William Worden," stipulation for value given by the latter vessel, the opinion of the district court, the decree of the district court, libellants' notice of appeal therefrom to the circuit court, and the amendments made by the circuit court to its findings as contained in its first opinion above set forth.

354 At a stated term of the circuit court of the United States for the southern district of New York, held at the court-rooms thereof, in the P. O. building, in the city of New York, on the 17th day of April, 1886.

Present: Honorable William J. Wallace, judge.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY *et al.*
ag'st
THE STEAM CANAL-BOAT "SYDNEY" and THE CANAL-BOAT "WILLIAM WORDEN," whereof CHARLES E. WAGER is Claimant.

The libellants having appealed to this court from the judgment of the district court entered in this action on the 18th day of February, 1885, dismissing the libel herein with three hundred and forty and $\frac{92}{100}$ dollars costs, as taxed, and the said appeal having been heard in this court and by an opinion of this court filed on the 18th day of March, 1886, in which it was decided that the claimant might have permission to apply to this court for leave to introduce further evidence upon the question whether the loss arose from the want of ordinary care and skill in the navigation of the boats within

twenty days thereafter, and the claimant, within the time
355 mentioned in said opinion, having made application to this court for leave to introduce such proof, now, on reading and filing the said opinion of this court, the affidavit of J. A. Hyland, and notice of motion for permission to introduce such proof, and after hearing Messrs. Hyland & Zabriskie, proctors for the claimant, in behalf of said motion, and E. D. McCarthy, Esq., proctor for the libellants, in opposition thereto, it is—

Ordered that the claimant hereby has leave to introduce in this action proof upon the question whether the loss arose from the want of ordinary care and skill in the navigation of the boats, and that he have to and including May 20th, 1886, to introduce such proof, and that the libellants have to and including July 1st, 1886, to introduce their proof upon said issues, such testimony to be taken before any notary public or U. S. commissioner, on condition that the claimant do furnish an additional bond for costs in the sum of three hundred dollars ($300) before such testimony is taken.

(S'g'd) WM. J. WALLACE.

A copy.
[SEAL.] TIMOTHY GRIFFITH, *Clerk.*

The bond above referred to was duly given and filed by the said claimant.

356 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-room, in the city of New York, on Wednesday, the fifteenth day of August, in the year of our Lord one thousand eight hundred and eighty-three.

Present: The Honorable Addison Brown, district judge.

(Same title.)

The marshal having returned, in the monition issued in the above-entitled cause, that he had attached the said vessel, her tackle, apparel, and furniture, and, upon the certified copy order of short publication, that he had given due notice to all persons claiming the same that the court would on this day proceed to the trial and condemnation of the said vessel, her tackle, &c., should no claim be interposed for the same, whereupon, on motion of E. D. McCarthy, Esquire, proctor for the libellants, proclamation was made for all persons interested in the said vessel, her tackle, &c., to appear and interpose their claims; and Hyland & Zabriskie appearing, on like motion, for claimant of the steam canal-boat "Sydney," it is further ordered that the defaults of all other persons be, and the same are, accordingly hereby entered.

And, on like motion and the consent hereto annexed of said Hyland & Zabriskie, it is further ordered that the clerk of this court issue a writ of *venditioni exponas* to the marshal of this district for the sale of said steam canal-boat "Sydney," her engines, boilers, &c., returnable September term, 1883, the marshal giving six days' notice of sale pursuant to law, and that the proceeds of such sale be paid by said marshal into the registry of this court to the credit of this action to abide the further order and decree of this court.

ADDISON BROWN.

We consent to the entry of the foregoing order.
August 14, '83.

HYLAND & ZABRISKIE,
Proctors for Claimant "Sydney."

357 SOUTHERN DISTRICT OF NEW YORK, *ss:*

The President of the United States of America to the marshal of the southern district of New York, Greeting:

Whereas a libel was filed in the district court of the United States for the southern district of New York on the 23d day of
[L. S.] July, in the year of our Lord one thousand eight hundred and eighty-three, by—

THE PROVIDENCE WASHINGTON INSURANCE COMPANY *et al.*
against
THE STEAM CANAL-BOAT "SYDNEY" and THE Canal-Boat "Wm. Worden," Their Engines, &c.
} Collision, $9,211.75.

and praying that the same may be condemned and sold to pay the libellant the said amount; and whereas the said steam canal-boat "Sydney," &c., has been attached by the process issued out of the said district court, in pursuance of the said libel, and is now in custody by virtue thereof; the steam canal-boat "Worden" not found; and such proceedings have been thereupon had that by the consent and order of the said court in this cause made and pronounced on the sixteenth day of August, one thousand eight hundred and eighty-three, the said steam canal-boat "Sydney," her tackle, &c., is
ordered to be sold by you and said marshal, after giving six
358 days' notice of such sale, according to law, and that you have
the moneys arising from such sale, together with this writ, at
a district court of the United States to be held for the southern district of New York, at the city of New York, on the first Tuesday of September, one thousand eight hundred and eighty-three, and that you then pay the same to the clerk of the court: Therefore you and the said marshal are hereby commanded to cause the said steam canal-boat "Sydney," &c., so consented to and ordered to be sold, to be sold in manner and form upon the notice and at the time and place by law required, and that you have and pay the moneys arising from such sale pursuant to the aforesaid order or decree; and have you also then and there this writ.

Witness the Honorable Addison Brown, judge of the said court, at the city of New York, in the southern district of New York, this seventeenth day of August, in the year of our Lord one thousand eight hundred and eighty-three, and of our Independence the one hundred and eighth.

SAM'L H. LYMAN, *Clerk.*

E. D. McCARTHY,
Proctor for Libellant.

In obedience to the above precept I have sold the steam canal-boat "Sydney," &c., and such sale amounts to twenty-one hundred dollars, which sum, after deducting my costs and disburse-
359 ments, amounting to $166.84, I have paid to the clerk of this court, as I am above commanded.

Dated this third day of May, 1884.

JOEL B. ERHARDT,
U. S. Marshal.

U. S. District Court, Southern District of N. Y.

(Same title.)

It is hereby consented and agreed that the value of the said canal-boat "William Worden" be fixed at one thousand dollars in lieu of an appraisement, and that the bond to marshal may be given in that amount.

Dated N. Y. city, August 28th, 1883.

HYLAND & ZABRISKIE,
Proctors for Claimant.
EDWARD D. McCARTHY,
Libellants' Proctor.

360 District Court of the United States for the Southern District of New York. In Admiralty.

Stipulation for Value Entered into Pursuant to the Rules and Practices of this Court. Filed the Third Day of September, 1883.

Whereas a libel was filed on the 23rd day of July, in the year of our Lord one thousand eight hundred and eighty-three, by the Providence Washington Insurance Company & another against the canal-boat "William Worden," impleaded with the steam canal-boat "Sydney," for the reasons and causes in the said libel mentioned; and whereas the seizure of the said canal-boat "William Worden" by the marshal under the process issued in pursuance of the prayer of the said libel has been waived and the value of said steam-tug for the purposes of this action has been fixed by consent and in lieu of appraisement at the sum of ten thousand dollars, as appears from said consent now on file in said court, and the parties hereto hereby consenting and agreeing that, in case of default or contumacy on the part of the claimant or his sureties, execution for the above amount may issue against their goods, chattels, and lands:

Now, therefore, the condition of the stipulation is such that if the stipulators undersigned shall at any time, upon the interlocutory or final order or decree of the said district court or of any appellate court to which the above-named suit may proceed, and upon notice of such order or decree to Hyland & Zabriskie, Esquires, proctors for the claimant of said canal-boat "William Worden," abide by and pay the money awarded by the final decree rendered by the court or the appellate court, if any appeal intervene, then this stipulation to be void; otherwise to remain in full force and virtue.

CHARLEY E. WAGER.
HENRY MORSE.
ALANSON MORSE.

Taken and acknowledged this 28th day of August, 1887, before me as to Charles E. Wager.

[SEAL.] DANIEL J. AUGUSTINE,
Notary Public, N. Y. Co.

Taken and acknowledged this 31st day of August, 1883, as to Henry Morse and Alanson Morse.

[SEAL.] THOMAS M. CUTTING,
Notary Public for Erie County.

361 NORTHERN DISTRICT OF NEW YORK, *ss:*

Henry Morse and Alanson ——, parties to the above stipulation, being duly sworn, depose and say and each for himself deposes and says that he resides in Buffalo, in the northern district of New York; that he is worth the sum of two thousand dollars over and above all his just debts and liabilities.

HENRY MORSE.
ALANSON MORSE.

Sworn to this 29th day of Aug., 188–, before me—

[SEAL.] THOMAS M. CUTTING,
Notary Public for Erie County.

Recorded this — day of ——, 188–.

Approved September 3rd, 1883.

E. D. McCARTHY,
Proctor for Libellant.

(Title.)

362 BROWN, *J.:*

The libellants at Buffalo insured a cargo of wheat on board the canal-boat Worden, in tow of the Sydney, consigned to Armour, Plankinton & Co., of New York. One of the steam-flues of the Sydney having burst while she was coming down the Hudson river, she became unmanageable, and, as the answer states, drifted with the tide upon the rocks of Esopus Island, whereby the cargo on board the Worden was lost. The cargo was abandoned to the libellants, who thereupon paid the consignees, as for a total loss, 363 $9,211.75, and, claiming to be subrogated to the rights of the consignees against the carrying vessels for the loss of the wheat, filed this libel to recover the sum of $6,175.89, the amount of the loss, deducting the sum realized from the damaged cargo. The libel alleged that the stranding occurred through the negligence of the respondents, which the answer denies.

On the question of negligence no evidence was given upon the trial. On that point both sides rested upon the pleadings, each claiming that the burden of proof was upon the other. Without reference to the question of negligence, however, inasmuch as the carrier had given a clean bill of lading, binding himself to a delivery of the goods without exception or qualification, the libellants claim that upon payment to the consignees they were subrogated to the benefit of the consignees' right of action for the loss of the goods against the carrier as the principal debtor for the non-delivery of the cargo; also that upon the admissions of the answer it was incumbent on the carrier to show that the stranding was without any fault on his part, if that is material.

The general principles of law invoked by the libellants are not denied, either as regards an insurer's right to subrogation, upon payment of a total loss, to the rights of the assured against any other persons primarily liable for such loss or as regards the presumptions of negligence. The only question is as to the applicability of these principles to the facts of the case.

The contract of insurance in this case contains no express provision for any subrogation of the insurer to the rights of the assured on payment of the loss. In such cases the right of subrogation, if any exists, being no part of the contract, does not depend upon the contract or on the form of it, but is a mere equity to be worked
364 out through the rights of the assured only in his relations to other parties.

If the assured has a legal right to indemnity for the loss against a carrier that has no legal or equitable right to the benefit of the insurance, then the liability of the carrier to the assured is regarded as the primary liability for the loss, and the liability of the insurer as secondary and similar to that of a surety only. The insurer on payment is, therefore, held in such cases to be equitably entitled to stand in the shoes of the insured and to recover such indemnity as the insured was entitled to recover against other persons having no right to the benefit of the insurance. (Mobile, &c., *vs.* Jurey, 111 U. S., 584–594; Hall *vs.* R. R. Cases, 13 Wall., 367; Garrison *vs.* Memphis Insurance Co., 19 How., 312.) In the case of Hall *vs.* Railroad Company, *supra*, the court say: "In respect to the ownership of the goods and the risk incident thereto the owner (the assured) and the insurer are considered but one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract for non-performance of his legal duty. Standing thus as the insurer does, practically in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner (the assured) for the loss he is entitled to all the means of indemnity which the satisfied owner (the assured) held against the party primarily liable. His right rests upon the familiar principles of equity. It is the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner (the assured). Hence it has often been ruled that an insurer who has paid a loss may use the name of the assured in an action to obtain redress from the carrier whose failure of duty caused the loss."

365 As the right of the libellants to subrogation can only be claimed through the rights of the assured, the questions chiefly litigated were, first, who were insured under the policy in this case, and, second. was the owner of these vessels equitably entitled to the benefit of the insurance, so as to cut off any right of subrogation that the insurers might otherwise have had against him.

The facts are as follows: The policy was issued in the name of Morse & Co., whose business is variously described as that of forwarders, carriers, transportation brokers or, familiarly, scalpers. For convenience I shall call them forwarders. They belong to a class of middle-men long established in Buffalo, who handle all the freight business there as intermediaries between the boatmen and the owners of grain and produce or their agents who desire to ship it eastward. The forwarders see the consignors, agree upon the price of freight, which includes insurance; procure boats to take the grain upon the terms fixed, get a certificate of insurance and deliver it to the shipper along with the bill of lading, which they sign as well as the captain; pay prior charges, if any; make any advances necessary to the boatmen for the trip, and receive, as compensation for their services, a commission, usually 5 per cent., upon the amount of stipulated freight. The insurance companies that engage in this kind of insurance have provided a particular form of policy specially prepared for it. The shipper designates the company in which the insurance shall be effected. The forwarder at the beginning of each season procures from the various companies what is termed an "open policy," which is attached to a "policy book," in which are entered the particulars of each insurance under it. To effect a particular insurance the policy and the policy book are taken to the office of the company's agents, who enter in the policy book
366 the particulars of the insurance as applied for, and thereupon issue and deliver to the forwarder a certificate stating that insurance is effected under the policy upon cargo on board the vessel, of the value designated and on account of the persons named, the loss, if any, payable to "the assured or order and return of this certificate." The certificate is thereupon indorsed in blank by the forwarder and delivered to the shipper with the bill of lading, also signed by the forwarder, as above stated.

The transaction in this case was in accordance with the general custom above described. The grain in question was in charge of Mr. Meadows, as agent of the consignees in New York. Morse & Co. applied to him in negotiating for its transportation, and agreed upon the rate of five cents per bushel, including insurance, which the shipper directed to be taken in the libellants' company. Morse & Co. thereupon placed the transportation with Captain Wager, the owner of the Sydney and the Worden, and the grain was loaded upon the latter. When the cargo was loaded Morse & Co. obtained the captain's bill of lading, and having previously procured a certificate of insurance delivered it, indorsed by them in blank, to Mr. Meadows, along with the bill of lading, which Morse & Co. also signed, paying him at the time $200 for prior charges. The bill of lading recited Meadows as shipper on board the Worden, and provided for the delivery of the grain to the consignees in New York, without any exception or qualification, on payment of freight and prior charges, which were to be paid to Brooks & Co., the New York agents of Morse & Co.

The form of insurance was as follows: The "open policy" No. 772 states that the libellants, "by this policy on account of Morse & Co., for whom it may concern, do insure the several persons whose names are hereinafter indorsed thereon as owner, advancer, 367 or common carrier on goods on his own boat or boats belonging to others, from place to place, as indorsed hereon or in a book kept for that purpose, for the amounts, at the rate, and on the goods specified in said indorsement; no risk considered as insured until said indorsement is approved and signed."

There are various provisions in reference to the lading and unlading and the time allowed therefor. The risks assumed by the company are those "of the seas, canals, rivers, and fire, and all other perils, losses, or misfortunes to the goods during said trip, excepting perils, &c., from ice, jettison, theft, &c., or from want of ordinary care and skill in lading or navigating said boats." There are numerous other provisions not material in this case. The certificate issued May 17th, on the application of Morse & Co., states that Morse & Co. is insured under policy No. 772 in the sum of $9,875 in board cargo of boat Wm. Worden, on wheat, $9,875, at and from Buffalo to New York, loss, if any, payable to assured or order and return of this certificate."

The name of the consignee is not usually made known to the forwarder, and was not in this case known to him until the grain was loaded. Upon the delivery of the bill of lading to the shipper the name and direction of the consignee were written in the margin. When Morse & Co. obtained the certificate of insurance they did not know who was to be the consignee. The agents of the insurers in Buffalo who insured the certificate and made the entry in the policy book were fully acquainted with the established customs and usages in this business. They knew that Morse & Co. were forwarders, doing business in the manner above stated; they understood that the certificate of insurance applied for was designed to accompany a bill of lading of the goods in question; that Morse & Co. obtained the shipment of this cargo as agents of the captain; that they 368 usually signed the bills of lading along with the captain; that they were accustomed to pay prior charges and to make advances to the captain; that the price of freight included insurance, and that Morse & Co. were paid for their services by a commission on the amount of freight.

Upon the facts above stated it is manifest that the consignees and the carrier, as well as Morse & Co., had, each of them, an insurable interest in the cargo to its whole value. Any person responsible for

goods in his custody has an insurable interest in them to the extent of his liability (3 Kent, 262; Hutch. on Carr., sec. 429; 2 Duer Ins., 49; Arnould do., sec. 107; Hooper *vs.* Robinson, 98 U. S., 528, 538; per Gray, J., Eastern R. R. *vs.* Relief, &c., 98 Mass., 423; Commonwealth *vs.* H. & L. Co., 112 Mass., 136, 141; Savage *vs.* Corn Exchange, &c., 36 N. Y., 655; Harvey *vs.* Cherry, 76 N. Y., 436; Warring *vs.* Ins. Co., 45 N. Y., 606). The consignee had an insurable interest because he was owner; the carrier, because as carrier he was answerable to the owner for the full value; Morse & Co., because by signing the bill of lading they were equally responsible to the consignee for the safe delivery of the cargo. As respects the consignee, indeed, both Morse & Co. and Captain Wager by signing the bill of lading jointly made themselves jointly liable as carriers, although as between themselves Morse & Co. were but agents in procuring freight and making advances on account of Captain Wager as principal. To secure themselves Morse & Co. took a separate bill of lading from the master, in which they were described as shippers, and the boat and cargo were consigned to Brooks & Co., New York, as agents of Morse & Co. As each of these three parties had an insur-
able interest to the full amount, it was competent for Morse
369 & Co., in taking out the insurance under an open policy "for
whom it might concern," to insure for the direct benefit of all three, and had the certificate of insurance, besides the words "Morse & Co.," contained the additional words "on account of whom it may concern," like the original policy, there can be no question that under the proofs in this case the policy would have inured directly to the benefit of all three and all of them be "the assured," for the evidence leaves no question that Morse & Co. intended this insurance to operate in some form for the benefit of all. The agents of the insurance company so understood it. Morse & Co. in effecting the insurance did it by the direct request of the consignees' agent; and they as clearly acted and were understood to be acting on account of the captain also. The insurance premium, though paid by Morse & Co., was charged as an advance against the captain and the freight and was allowed as such by the captain before the loss, and the direct evidence is that they acted for the captain's benefit as well as for their own. It is well settled that a policy "for whom it may concern" in such a case inures to the benefit of all persons having an insurable interest that are intended to be benefited by it whether known to the insurers or not, and that such persons may sue upon the policy in their own names. In such cases, also, a recovery by one inures to the benefit of all and bars a recovery by the others in privity. (Hooper *vs.* Robinson, 98 U. S., 528; Aldrich *vs.* Equitable Safety Ins. Co., 1 Woodb. & Min., 272; Henshaw *vs.* The Mutual, &c., 2 Blatch., 99; Fabri *vs.* Phœnix Ins. Co., 55 N. Y., 129, 133; Walsh *vs.* Washington, &c., 33 do., 427, 439; The Monarch Ins. Co., 5 El. & Bl., 870; 1 Arnould Ins., 169, note.)

The certificate of insurance issued in this case does not contain
the words "on account of whom it may concern" or any
370 equivalent words, but the names of Morse & Co. only. The
necessary construction of the original policy, with its condi-

tions, is that, in order to make any particular transactions available under it, the names of the individuals on whose account any particular insurance under it is effected must appear by endorsement on the policy or by an entry made in the policy book. This condition of the policy is a perfectly lawful one, and, being clearly expressed, is controlling. In this case the name of Morse & Co. alone is entered in the policy book, without any such additional words as "for whom it may concern," nor are they described as agents. The certificate is in accordance with this entry, and is made payable to Morse & Co. or their order. There is no language that can be so extended as to include any other persons. Upon the written contract, therefore, "the assured," in the language of the policy, are Morse & Co. only. In such a case parol evidence is not receivable to vary the written contract or to enlarge the interests of the persons directly assured. (Arnold Ins., 169, note; Mead *vs.* Mercantile, &c., 67 Barb., 519.) The endorsement of the certificate by Morse & Co. to the consignees, who were the owners of the cargo, effectually secured the latter, and the consignees, in receiving payment of the loss from the insurers, received it not as "the assured" under the policy, but as the endorsees of Morse & Co. pursuant to the terms of the contract, which provided for payment "to order." This was the mode agreed on and accepted for the security of all. It was a legal and effectual mode. In paying the consignees the insurers paid them on account of Morse & Co., who were "the assured" pursuant to the endorsement, and hence the rights, if any, to which the insurers were subrogated upon this payment were the rights of Morse & Co. and not the rights of the consignees, independently considered, 371 against Captain Wager and his vessels. In legal effect the transaction is the same, as respects the insurers' rights of subrogation, as if they had paid the whole loss to Morse & Co. as the assured, and the latter had then paid the owners in discharge of their liability to them.

2. The relation of Morse & Co. and Captain Wager, as between themselves, was, as I have said, that of agent and principal. Morse & Co., by signing the bill of lading, had, indeed, made themselves liable as principals to the consignees, but, as between themselves, their liabilities were those of principal and surety. The insurance effected by Morse & Co. was, as I have said, clearly shown by the evidence to have been intended as much for the benefit of Captain Wager as for themselves. It was effected upon his request and authority, and the premiums paid by Morse & Co. were charged against the captain and freight. Captain Wager was absolutely liable to Morse & Co. for this advance of premiums, whether the freight or insurance money should ever be collected or not. The fact that these premiums, as part of the freight, were a lien upon the cargo and would be repaid to the captain or to Morse & Co. upon the delivery of the cargo to the owners, in case there were no loss of the cargo, is therefore immaterial as respects Captain Wager's interest in the policy. The insurance company sufficiently understood all this, since it was in the usual course of business, as fully understood by them; but the insurance did not cover any negligence of the

carrier, because such negligence was expressly excepted by the
terms of the policy. Under such circumstances there can be
no question that Morse & Co., on recovering from the insur-
ance company the whole amount of the loss, would hold the
money for the discharge of the joint obligation of themselves
and Captain Wager to the consignee, and to that extent they
would be regarded as trustees of Captain Wager, as the
372 principal obligor, and Captain Wager, as principal, would
have the right to compel that application of the insurance moneys. This would not in any way conflict with any of the terms of the policy or of the certificate, and the relation of the parties and the circumstances that gave Captain Wager this right could, therefore, be legally established by parol. The situation is in substance analogous to the situation of mortgagor and mortgagee, where the latter, at the request of the mortgagor, insures the mortgaged premises in his own name and at the expense of the mortgagee, and the insurance is intended for the benefit of both. In such cases it has been repeatedly held that the mortgagor is entitled to the benefit of the insurance, and to have the amount paid to the mortgagee by the insurers applied in reduction of the mortgage debt, and that the insurers consequently have no right of subrogation thereto. (Holbrook *vs.* American Ins. Co., 1 Curt., 193, 200; Kernochan *vs.* N. Y. Bowery, &c., 17 N. Y., 428; Warren *vs.* Louder, 53 N. Y., 581, 585; Cromwell *vs.* Brooklyn Fire Ins. Co., 44 N. Y., 42, 47; Story, J., in Prov. W. Ins. Co., 16 Pet., 502 to 507.)

But if the mortgagee insured his own interest without any privity with the mortgagor, or if the insurance policy itself in terms provides for subrogation to the mortgagee's rights upon payment of the loss, then the terms of the policy will prevail and the mortgagor cannot have the benefit of the insurance or compel the application of the payment to the reduction of his debt, and the insurers will be entitled to be subrogated to the mortgagee's rights against him. (Springfield, &c., *vs.* Allen, 43d N. Y., 389; Excelsior, &c., *vs.* R. Ins. Co., &c., 55 N. Y., 343, 359; Foster *vs.* Van Reed, 70 N. Y., 19; Bank of So. Car. *vs.* Bickwell, 1 Clif., 85, 91 to 93.)

373 In this case there is no provision for subrogation in the insurance contract; hence any right of subrogation here, as previously stated, is a mere equitable right depending upon the actual relation of the other parties to each other. It is therefore subordinate to the equitable rights existing between a principal and his agent who effects the insurance for the benefit of both and upon the account and at the primary charge of the principal.

It has been held that where the carrier expressly stipulates in the bill of lading that he shall have the benefit of any insurance effected upon the goods by the shippers no subrogation against the carrier would arise in favor of the insurers upon their payment of a loss. (Carstairs *vs.* Mechanics, &c., 18 Fed. Rep., 473; Rintoul *vs.* N. Y. Cent., 21 Blatch., 429; 17 Fed Rep., 905.)

If such a stipulation is upheld when inserted in the bill of lading it must be equally valid when clearly proved to exist by extrinsic evidence. This insurance having been obtained, in fact, for the

benefit of Captain Wager as the principal carrier, and at his primary charge and request, as well as for the benefit of the agent, and also for the benefit of the consignees through an indorsement of the certificate to them, the insurers in effect knowing all the facts, Captain Wager as principal has the superior equity to the application of the insurance moneys in discharge of his liability as carrier; and as this equity is incompatible with any subrogation to the rights of Morse & Co., as the "assured," against Captain Wager or his vessel, no such subrogation can be allowed. The insurer's right being a mere equity to stand in place of Morse & Co., their right is subject to the same equities that affect Morse & Co. (See Kernochan *vs.* Bowery,
17 N. Y., 428; Benjamin *vs.* Saratoga Mutual, &c., 17 N. Y.,
374 415, 420; Cromwell *vs.* Brooklyn Fire Ins. Co., 44 do., 42, 47.)
As Captain Wager, moreover, had the right to have the moneys paid by the insurers, whether it was paid to Morse & Co. or to their indorsees, applied in discharge of his, Captain Wager's, obligation as carrier, the payment by the insurers operated in law as an extinguishment of Captain Wager's liability, and hence no obligation of Captain Wager to either Morse & Co. or to the owners remained to which there could be any subrogation.

3. In what has been said above, reference has been had to a loss only through causes covered by the policy. The policy, however, expressly excepts "want of ordinary care and skill in lading or navigating said boats." If the loss in this case happened through the negligence of Captain Wager or the carrying vessels, or from the want of ordinary care, then the loss was not covered by the policy, and no one was entitled to recover upon it against the insurers. For the loss by such negligence the consignee could have held both Morse & Co. and Captain Wager under the bill of lading, which both had signed, and Morse & Co., on paying the consignees, could have resorted to Captain Wager and the carrying vessels for his indemnity, though he would have no valid claim upon the insurance company. If the case were one of doubt whether the loss happened by negligence or not, and the carrier were a stranger to the policy, having no equitable interest in the application of the insurance moneys, the insurers, instead of litigating their liability with the assured or their endorsees, might pay the owners of the cargo, as they did in this case, and take, as they did here, an abandonment of the goods, with an assignment of all claims for damages to themselves, and then prosecute the carriers for indemnity. (Excelsior, &c., *vs.* R. Ins. Co.,
55 N. Y., 343, 352.) It is not material to the carrier, accord-
375 ing to the authorities, with whom he litigates the question of
negligence, and the insurers in settling and paying such doubtful claims are not mere volunteers. (The Monticello, 17 How., 152, 155; Insurance Co. *vs.* The C. D., Jr., 1 Woods, 72; The Sun Mutual, &c., *vs.* The Mississippi, &c., 17 Fed. Rep., 919.)

But here the carrier, as I find upon the facts, is not a mere stranger to the insurance. He is equitably entitled to the benefits of the policy, and hence entitled by an equity paramount to that of the insurers and as against Morse & Co. or their indorsees to have any moneys paid on account of the loss to either of them applied in discharge of his own obligation. Any voluntary settlement made by the insurers with either enures to his benefit as much as to theirs.

A voluntary settlement and payment are in general binding and cannot be ripped up and set aside except upon some of the special and recognized legal grounds therefor, such as duress, fraud, or mistake of fact. (2 Greenl. Ev., secs. 85, 120, 123; Elliott *vs.* Swartwout, 10 Peters, 137–154; Nichols *vs.* U. S., 7 Wall., 128.)

This rule applies not only to the immediate parties to the settlement, but in favor of those also who are in privity with them.

The carrier here, being equitably entitled to the benefits of the policy, is clearly in privity with Morse & Co., the assured, and their indorsees.

A settlement by the insurers with either enures directly to the benefit of all. It is as binding as respects all as respects either, and it cannot be set aside as against either except upon some of the special grounds above referred to.

Upon either of these grounds it might be set aside, doubtless in an action against the carrier, but then only upon appropriate averments in the libel and upon appropriate proof, and in such a
376 case the whole burden of proof is upon the libellants.

"It is incumbent upon them," say the court, in the analogous case of Hooper *vs.* Robinson, 98 U. S., 540, "to establish everything necessary to entitle them to recover, and they have no right to throw upon the defendants any part of the burden that belonged to themselves." (See Transportation Co. *vs.* Downer, 11 Wall., 129, 134.)

If the proofs had shown, therefore, that this loss occurred by such negligence as rendered the insurers not liable upon their policy, and that the insurers had settled with and paid the owners upon a clear mistake of the facts in regard to their liability, I should hold that the libellants would be entitled to maintain an action under an appropriate libel for that purpose.

The libel charges negligence; the answer denies it, and states that the stranding occurred under such circumstances as negative the charge. These averments of the answer must be taken as a whole. The libellants, having once paid the loss as a loss covered by the policy, if they sought to recover back the amount paid in an action against a carrier equitably entitled to the benefit of the policy on the ground that the loss was within one of the exceptions of the policy and was paid under a mistake of fact, must sustain the entire burden of proof and affirmatively show both their ignorance and mistake as to the fact and that the loss was actually within the exceptions of the policy.

The libellants are not in the situation of mere naked assignees of a cause of action for damages held by the consignees against the carrier, nor do they sue in that character. It has been said that insurance companies have no power to purchase and sue on such claims, independent of any question of their own liability.
377 (Excelsior *vs.* R. Ins. Co., 55 N. Y., 343, 357.) Here they sue as insurers who have paid the loss, as a loss covered by the policy, and they now claim subrogation in consequence of such

payment to a claim against the carrier. If for the reasons above stated they might be allowed to reopen the settlement made upon mistake of fact and prove that the loss was one not really obligatory on them to pay because caused by negligence, the action must be one appropriate to that purpose and the burden of proof in all respects be sustained by them.

Neither the form of action nor the proofs meet these requirements, and the libel must, in every point of view, therefore, be dismissed with costs.

378 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on the 18th day of February, in the year of our Lord one thousand eight hundred and eighty-five.

Present: The Honorable Addison Brown, district judge.

PROVIDENCE WASHINGTON INSURANCE COMPANY and SECURITY INSURANCE COMPANY
vs.
THE STEAM CANAL-BOAT "SYDNEY" and Her Consort, THE CANAL-BOAT "WILLIAM WORDEN."

This cause having been heard upon the pleadings and proofs, and having been submitted upon the arguments and briefs of the proctors for the respective parties, now, on motion of Hyland & Zabriskie, proctors for the claimant, it is—

Ordered, adjudged, and decreed that the libel herein be, and the same is hereby, dismissed on the merits, with three hundred and forty $\frac{92}{100}$ dollars costs, as taxed.

It is further ordered that, unless an appeal be taken from this decree within the time prescribed by law and the rules and practice of this court, the libellants' stipulators for costs cause the engagements of their stipulation to be performed.

ADDISON BROWN.

A true copy.
[SEAL.] SAM'L H. LYMAN, *Clerk.*

379 District Court of the United States for the Southern District of New York.

(Title.)

SIRS: Take notice that the libellants herein appeal to the next circuit court of the United States for the southern district of New York, in the second circuit, from the final decree entered herein on the 18th day of February, 1885, dismissing the libel in this action, with $240.92 costs.

N. Y., February 19, 1885.
Yours, &c., EDWARD D. McCARTHY,
Libellants' Proctor.

To Hyland & Zabriskie, Esqs., proctors for claimant; Samuel H. Lyman, Esq., clerk of the U. S. district court for the southern district of New York.

Petition of appeal follows.

380 United States Circuit Court.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY *et al.*
vs.
THE STEAM CANAL-BOAT "SYDNEY" and Her Consort, THE "WILLIAM WORDEN."

Additional Findings of Fact.

1. Amend the third finding of fact by inserting at the end thereof "The agreement for transportation between Armour, Plankinton & Company and Morse & Company was as follows: (Insert bill of lading, Libellants' Exhibit 1.) "The agreement made between Morse & Company and the master of the Worden was as follows: (Insert Claimant's Exhibit E.)

2. Amend the fourth finding of fact by inserting at the end thereof "The first-named bill of lading was signed also by the master of the Worden."

3. Strike out the ninth finding of fact and insert in place thereof as follows: (Nine.) "There is no evidence of any negligence on the part of the Worden or the Sydney, except that the steam-boiler of the Sydney was in an unsafe and unfit condition for the purposes of the voyage. The flues were weak, one of them burst, the steam escaped, all motive power was lost, and in consequence thereof the Worden was carried by the wind and tide upon the rocks. The boiler had not been thoroughly tested or examined since the preceding July. Two or three days before the accident the boiler leaked steam upon the voyage, commencing at Schenectady and continuing until the boats reached Troy. At Troy the master of the Sydney caused repairs costing $3.50 to be made to 381 the boiler, but no thorough examination or special test of the boiler was made to ascertain what its condition really was. The condition of the boiler was such that the defects existing would have been discovered if a thorough examination and test had been made.

Shortly after the accident necessary repairs upon the boiler and engine were made, which cost over $200.

Conclusions of Law.

1. The loss was sustained by reason of the negligent navigation of those in charge of the Sydney.

2. The libellants are entitled to a decree in the sum of $6,175.89, with interest from May 28th, 1883, with costs of this court and of the district court.

(S'g'd) WM. J. WALLACE.

382 And inasmuch as the said several matters produced and given in evidence in the said circuit court and the said exceptions do not appear by the record of the decree of said court, the proctors for the said claimant have prepared and caused this bill of exceptions to be sealed as a record thereof, according to the statute

in such case made and provided and the course and practice of this court.

Signed and ordered on file.

Dated Sept. 27th, 1887.

WM. J. WALLACE. [L. S.]

Endorsed: U. S. circuit court, S. D. of N. Y. Providence Washington Insurance Company & ano. ag't The Steam Canal-Boat Sydney & ano. Claimant'- bill of exceptions. Hyland & Zabriskie, proctors for claimant. Due and timely service of a copy of the within bill of exceptions is hereby admitted. Dated New York, Sept. 24, 1887. E. D. McCarthy, proctor for libellants. U. S. circuit court. Filed Oct. 4, 1887. Timothy Griffith, clerk.

383 U. S. Circuit Court, Southern District of New York.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY *et al.*
vs.
THE STEAM CANAL-BOAT SYDNEY, &c.

We hereby consent that the foregoing papers shall constitute the record to be sent by the clerk of the circuit court of the United States for the southern district of New York to the Supreme Court of the United States on the appeal to said Supreme Court in the above-entitled cause, without prejudice to any motion hereafter to be made to correct the same if any errors shall be found to be contained therein.

N. Y., Oct. 11th, 1887.

HYLAND & ZABRISKIE,
Proctors for Cl'm't & App'l't.
EDW'D D. McCARTHY,
Proctor for Libellants.

Endorsed: U. S. circuit court. Filed Oct. 12th, 1887. Timothy Griffith, clerk.

384 UNITED STATES OF AMERICA,
Southern District of New York, } *ss:*

Seal of U. S. Circuit
Court, South. Dist.
New York.

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to three hundred and eighty-three, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The Providence Washington Insurance Company of Providence, Rhode Island, and The Security Insurance Company of New Haven, Connecticut, libellants & appellees, against The Steam Canal-Boat "Sydney," her engines, etc., and The Canal-Boat "William Worden," her tackle, apparel, &c., whereof Chas. E. Wager is claimant & appellant, as the same remain of record and on file in said office